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PURSUING EDUCATIONAL OPPORTUNITIES FOR LATINO/A STUDENTS*

KRISTI L. BOWMAN**

The number and percentage of Latino/a students in U.S. public schools continue to grow rapidly, yet the literature lacks a comprehensive analysis of how existing law can be used to advocate for these students' interests. This Article first lays the sociolegal foundation necessary to contextualize such an analysis. Then, it aims to provide such an analysis by evaluating the present utility of three major litigation initiatives and three important policy initiatives which parents, advocates, and school districts have employed in the pursuit of educational equity for Latino/a students: school desegregation litigation, school finance litigation, Equal Educational Opportunities Act litigation, civil rights education recordkeeping, English language instructional alternatives, and voluntary, multifactor socioeconomic status integration. Ultimately, this Article argues not only for pursuing all initiatives concurrently, but also for continuing to value and employ race/ethnicity-conscious measures (rather than color-blind ones) as our society pursues the goal of advancing educational opportunities for all children.

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** Associate Professor of Law, Michigan State University. J.D., M.A., Duke University; B.A., Drake University. An earlier version of this paper was presented at the conference, *Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South and the Nation*, in Chapel Hill, North Carolina on April 2, 2009. The conference was organized by the University of North Carolina School of Law, The Civil Rights Project at UCLA, and the University of Georgia Education Policy and Evaluation Center. This paper was also presented at the LatCrit XIV Conference on September 4, 2009. For helpful comments and conversations, the author thanks many fellow conference participants, Erica Frankenburg, Rachel Moran, and also the North Carolina Law Review editors, especially Maria Lapetina. For research assistance, the author thanks Caitlin Salazer-Reid and Lauren Foley.

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INTRODUCTION

In fall 2007, Latinos/as¹ made up 20.9% of all public school students in the United States; African Americans comprised 15.3%.² Between 1972 and 2007, the total number of Latino/a students in U.S. public schools more than tripled.³ Sadly, the educational experiences of these students are often second-rate: Latino/a students often are concentrated in elementary and secondary schools populated mainly by other Latinos/as and students in poverty;⁴ on average, Latino/a children continually fail to achieve at the same levels as White children;⁵ many Latinos/as face significant language barriers in education;⁶ and, Latino/a parents often perceive that their children are discriminated against in school.⁷ These conditions are complicated by the fact that an increasing number of Latino/a families are moving to areas where few Latinos/as have lived and attended school until recently.⁸ Not surprisingly, scholars describe educational access issues

1. "Latino/a" is shorthand for Latino/Latina. The term "Latino" is gendered and used in much the same way that "men" and "his" are used in English—sometimes indicating men, and sometimes purportedly inclusive of women as well. Thus, I use the term "Latino/a" with the goals of gender inclusivity and neutrality.

2. NAT'L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2009*, at 136 (2009), available at <http://nces.ed.gov/pubs2009/2009081.pdf> (providing statistics regarding the racial and ethnic distribution of public school students from 1972–2007).

3. *See id.*

4. *See infra* Parts I.B.1, I.B.2.c, I.B.2.d.

5. *See infra* Part I.B.2.a.

6. *See infra* Part I.B.2.b.

7. RICHARD FRY & FELISA GONZALES, PEW HISPANIC CTR., *ONE-IN-FIVE AND GROWING FAST: A PROFILE OF HISPANIC PUBLIC SCHOOL STUDENTS 9* (2008), available at <http://pewhispanic.org/files/reports/92.pdf>. ("In 2002, 75% of Hispanics said that discrimination was a problem in schools. Just five years later, in 2007, 84% reported the same.")

8. Marie C. Scott, Note, *Resegregation, Language, and Educational Opportunity: The Influence of Latino Students in North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123, 123–24 (2008); *see also* RICHARD FRY, PEW HISPANIC CTR., *THE CHANGING LANDSCAPE OF AMERICAN PUBLIC EDUCATION: NEW STUDENTS, NEW SCHOOLS* 14–16 (2006), available at <http://pewhispanic.org/files/reports/72.pdf> (describing the changing settlement patterns of Latinos/as in America since the 1980s and the effect on public school demographics).

as “some of the most important public policy questions concerning Latinos.”⁹

Latinos/as’ rapid population growth is projected to continue, due largely to a high birth rate and to immigration.¹⁰ By 2050, the number of school-age Latino/a children is expected to exceed the number of school-age White children.¹¹ Yet, many discussions about educational equity continue to focus primarily on African American children.¹² Or, when scholars and policy advocates mention Latino/a children within a larger discussion of educational equity, many appear unsure about how to consider Latino/a children, except for noting the additional challenges faced by some Latinos/as as English Language Learners (“ELLs”). It is understandable that any one study or article must be limited in some way, but the literature taken as a whole continues to demonstrate a pronounced lack of attention to the uniquely inequitable educational experiences of Latino/a students except for a subset of articles emerging primarily over the past decade which, like this piece, focus on Latino/a students exclusively.¹³

9. Scott, *supra* note 8, at 123.

10. See *infra* Parts I.B.1, I.B.2.e.

11. FRY & GONZALES, *supra* note 7, at i.

12. For a discussion describing this phenomenon, see CATHERINE L. HORN & MICHAL KURLAENDER, THE CIVIL RIGHTS PROJECT (HARVARD), THE END OF KEYES—RESEGREGATION TRENDS AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS 5 (2006), http://www.civilrightsproject.ucla.edu/research/deseg/denver-4_5_06.pdf (“[T]he majority of the achievement studies in the desegregation literature focus on African Americans . . .”).

13. Other authors have recognized the need to include Latinos/as in the study of broader social patterns as well. The UCLA Civil Rights Project/*Proyecto Derechos Civiles* (formerly the Civil Rights Project at Harvard University) is a notable exception; its publications have discussed the educational experiences of Latino/a students in concert with White and African American students for decades. For more recent examples of the Civil Rights Project’s multiracial/ethnic focus, see generally Gary Orfield, Erica D. Frankenberg & Chungmei Lee, *The Resurgence of School Segregation*, EDUC. LEADERSHIP, Dec. 2002–Jan. 2003, at 16 [hereinafter Orfield, Frankenberg & Lee, *Resurgence of School Segregation*] (describing a rising trend of de facto segregation among African American, Latino/a, and White students in public schools); ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, THE CIVIL RIGHTS PROJECT (HARVARD), A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (2003) [hereinafter FRANKENBERG, LEE & ORFIELD, A MULTIRACIAL SOCIETY], available at <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf> (examining resegregation trends across ethnic groups in public schools at national, regional, state, and district levels); GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES* (UCLA), HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007) [hereinafter ORFIELD & LEE, HISTORIC REVERSALS], available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf (offering recommendations for reducing public school resegregation among African American, White, and Latino/a children); GARY ORFIELD & ERICA FRANKENBERG, THE

Certainly, some of this gap in coverage can be attributed to the existing sociolegal frameworks, which do not fully account for the past and present experiences of Latinos/as, students or otherwise. For example, the civil rights paradigm, which focuses on eliminating the Black/White racial disparity and the legacy of slavery through the development or enforcement of legal rights,¹⁴ is one obvious choice for making sense of the experience of a non-White racial/ethnic group in the United States. Yet, this paradigm is an ill fit because Latinos/as' history and present experiences differ from African Americans' in several material ways—not only because of the importance of language to Latinos/as experiences of immigration, but also because race has a different meaning for many Latinos/as than it does for African Americans.¹⁵ That said, perhaps the immigration/assimilation paradigm would be a better fit: it takes a long-term view of U.S. history and examines how various European immigrant groups rose

CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES (UCLA), *THE LAST HAVE BECOME FIRST: RURAL AND SMALL TOWN AMERICA LEAD THE WAY ON DESEGREGATION* (2008) [hereinafter ORFIELD & FRANKENBERG, *THE LAST HAVE BECOME FIRST*], available at <http://www.civilrightsproject.ucla.edu/research/deseg/lasthavebecomefirst.pdf> (suggesting that desegregation has been most successful for both African American and Latino/a students in rural and small town settings); GARY ORFIELD & CHUNGMEI LEE, *THE CIVIL RIGHTS PROJECT (HARVARD), NEW FACES, OLD PATTERNS? SEGREGATION IN THE MULTIRACIAL SOUTH* (2005) [hereinafter ORFIELD & LEE, *NEW FACES, OLD PATTERNS?*], available at http://www.civilrightsproject.ucla.edu/research/reseg05/reseg_lee05.pdf (reporting on public school segregation trends among African American and Latino/a students in southern and border states); GARY ORFIELD & JOHN T. YUN, *THE CIVIL RIGHTS PROJECT (HARVARD), RESEGREGATION IN AMERICAN SCHOOLS* (1999), available at http://www.civilrightsproject.ucla.edu/research/deseg/Resegregation_American_Schools99.pdf (introducing the phenomenon of public school resegregation in southern states among African American and Latino/a children); John Iceland & Rima Wilkes, *Does Socioeconomic Status Matter? Race, Class, Residential Segregation*, 53 SOC. PROBS. 248, 249 (2006) (emphasizing the importance of studying various racial/ethnic minority groups, including African Americans).

Other valuable literature analyzing Latinos/as' experiences in depth is cited throughout this Article.

14. See, e.g., Rachel F. Moran, *Neither Black nor White*, 2 HARV. LATINO L. REV. 61, 69 (1997); Cristina Rodriguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41, 43 (2009).

15. Douglas S. Massey, *Latinos, Poverty, and the Underclass: A New Agenda for Research*, 15 HISP. J. BEHAV. SCI. 449, 453–54 (1993); Moran, *supra* note 14, at 69–74; see Rodriguez, *supra* note 14, at 43–46. However, especially with the growing number of Black-multiracial individuals and Blacks who are foreign-born immigrants, “race” and “ethnicity” are becoming more complicated concepts even within the Black population in the United States. See, e.g., Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1230–31 (2008).

in status and wealth.¹⁶ However, this paradigm, too, is inadequate because a presumption of foreignness which often plagues Latinos/as does not attach to the White ethnic groups from Europe, which historically have constituted the bulk of the U.S. immigrant population.¹⁷ Thus, these existing paradigms are not a good fit for analyzing Latinos/as' experiences because, in the first instance, Latinos/as are not "other Blacks," and in the second instance, they are not "other Whites." Therefore, even though these paradigms focus on racially/ethnically marginalized groups, they do not exactly invite scholars to consider Latinos/as.¹⁸ It is impossible to know how much of the gap in the literature is attributable to the limitations of existing paradigms and how much is caused by other reasons including, in some circumstances, a lack of awareness about Latinos/as in our increasingly pluralistic society. Regardless, out of necessity, scholars often seem to rely largely on their own ad hoc paradigms when studying Latinos/as' experiences.

For these reasons, and also because of the increasingly diverse Black population in the United States,¹⁹ a new framework for thinking about racial/ethnic advantage and disadvantage is needed. While I do not propose a full-fledged framework in this Article, I do employ an approach cognizant of the incredible diversity among Latinos/as²⁰ and aware of the complicated interplay of race and

16. Moran, *supra* note 14, at 77–78.

17. *Id.*

18. See, e.g., Laura E. Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 9–11 (2005); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 *passim* (1997); Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 *passim* (2001).

19. Brown & Bell, *supra* note 15, at 1230–31.

20. Substantial differences in national origin, lived experience, and racial variation exist among Latinos/as. In Douglas Massey's words:

In theory, Hispanics include all those who trace their origins to a region originally colonized by Spain. It subsumes Argentines whose grandparents migrated from Italy to Buenos Aires at the turn of the century, Chinese whose forbearers [sic] were brought to Cuba as contract laborers, Amerindians whose progenitors entered the Amazon 30,000 years ago, Africans whose ancestors were imported to work as slaves on the sugar plantations of Puerto Rico, Spaniards whose families colonized Mexico, and mestizos who trace their lineage to the coerced union of Amerindian women and Spanish men.

Massey, *supra* note 15, at 453. The label of "Latino/a" has been imposed on a group of people who have nothing more in common than the fact that Spain once colonized the country which they or their ancestors called home. *Id.* Very little evidence of an

ethnicity—in particular the racialization of the (pan)Latino/a identity—in the U.S. context.²¹ I also cautiously choose to discuss

overarching “Latino/a” identity exists. Susan Welch & Lee Sigelman, *Getting to Know You? Latino-Anglo Social Contact*, 81 SOC. SCI. Q. 67, 68 (2000).

Although this description seems to assume that Latinos/as fit into various single-race categories, in Central America and South America, individuals are regularly assumed to have mixed-race ancestry and distinctions among individuals are more often based on “color,” which includes not only physical appearance but also assumptions about an individual’s social class. Melissa Nobles, *Lessons from Brazil: The Ideational and Political Dimensions of Multiraciality*, in THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS 300, 300–02 (Joel Perlmann & Mary C. Waters eds., 2002) [hereinafter THE NEW RACE QUESTION]; see LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 59–64 (2002) (describing the existence and impact of color distinctions in Brazilian society). The Pew Hispanic Center reports that when forced to fit themselves into the U.S.’s single-racial-category paradigm, roughly half of Latino/a students self-identify as racially White, while 42% self-identify as racially “other,” and 5% self-identify as multiracial. FRY & GONZALES, *supra* note 7, at 10. Only 5% of non-Latino/a students self-identify as being of an other, unlisted racial category. *Id.*

21. To the extent Latinos/as do have a coherent (pan)ethnic identity, they are tied together mainly by a history of Spanish colonization; by Spanish as a heritage language, whether they speak it or not; and by perceived commonality forced upon them by U.S. policymakers and communities, which often racializes them and at times assumes lack of citizenship. Massey, *supra* note 15, at 453; Ediberto Roman, *Common Ground: Perspectives on Latino-Latina Diversity*, 2 HARV. LATINO L. REV. 483, 486–87 (1997) (“It is not a coincidence that many of the attacks, both legal and otherwise, that are aimed at our community relate to our native language and the resultant perception of foreignness Notwithstanding their citizenship status, Latinos/as, as well as other non-whites, are often not viewed as Americans, but as foreigners. For instance, despite the 1917 Jones Act’s grant of United States citizenship to the people of Puerto Rico, to this day many Americans view Puerto Ricans as foreigners.”) (footnote omitted); *id.* at 488–89 (“Even the filth slurs directed at us [Latinos/as] often refer to our language Such language-based attacks are used to attempt to differentiate us from the rest of ‘American’ society.”).

For many Latinos/as, when they are identified by a non-Latino/a as being Latino/a—whether because of a Spanish surname, fluency in Spanish and/or English spoken with a Spanish accent, or traditionally racial phenotypic traits—that becomes their defining demographic. Latino/a ethnicity then assumes the centrality that race does for people who identify (or are identified) as members of non-White racial groups. However, Latino/a ethnicity differs from minority racial groups’ identities because Latinos/as are often presumed to be foreign and ultimately unassimilable, language and culture occupy a central role in their communities, a coherent “pan-Latino/a” identity appears not to exist, race is of much less significance within Latino/a communities given most Latinos/as’ multiracial heritage, and immigrant experiences pervade the community. Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1017 (2007) (“[E]thnicity and race remain undertheorized in LatCrit”); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 735 (2000); Massey, *supra* note 15, at 452–53 (explaining racial diversity among Latinos/as, their varied immigration experiences, and the lack of a single, coherent Latino/a identity); Roman, *supra*, at 486–89 (describing the pervasive discrimination and perceived “foreigner” status associated with Latinos/as’ use of the Spanish language). Because Latino/a ethnicity is assumed to be “on par” with African American or White racial categorizations, it becomes a racialized identity. Johnson, *supra*,

Latinos/as as an identifiable group in large part because in the United States they often are viewed, socially constructed, and discriminated against as such.²²

With this theoretical framework, I comprehensively assess advocates' ability under the law to pursue equitable educational opportunities for Latino/a students.²³ In Part I, I begin this task by situating the major litigation and policy "solutions" in context. First, I examine the historical relationship between school desegregation and bilingual education laws and litigation, and then I discuss the current demographics of the Latino/a population as well as Latino/a children's educational experiences. Building on that foundation, in Part II, I evaluate the present utility of three major litigation movements which have been driven substantially by students and their advocates as plaintiffs, and, in one instance, by school districts: school desegregation litigation, school finance litigation, and Equal Educational Opportunity Act litigation. Although litigation can be a powerful tool, legal regulation in the form of education policy can also play an important role in the pursuit of educational equity. Thus, in Part III, I turn to three major education policy initiatives connected to these litigation initiatives and to Latinos/as' educational experiences: civil rights recordkeeping, voluntary, multifactor socioeconomic status integration, and English language instruction alternatives. Although students' advocates may press for these initiatives, ultimately the decisions about whether to employ them are in the hands of government agencies and school districts.

at 734 ("Language often serves as a convenient proxy for race without invoking the obvious stigma of appearing to be racist."); Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1431 (2004) ("[F]or Latinos whose native or primary language is Spanish, language is race, or it is at least a primary, constructive part of Latino racial identity."); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 94 (1998) ("[T]he conflation [of Latinos/as' nationality and race] has managed to reduce Latinos to an American racialized group, regardless of their historical or racial identities.").

22. GUINIER & TORRES, *supra* note 20, *passim*; Laura E. Gomez, *Constructing Latino and Latina Identities*, 19 CHICANO-LATINO L. REV. 187, 189-90 (1998) (noting the importance of problematizing the Latino/a group label and yet the benefits of continuing to use it); Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1304 (1996); Steven Harmon Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years After Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 201, 206 (2005).

23. The litigation and policy solutions advocates have pursued rarely are considered in concert with one another, however, making this Article innovative in its approach.

By considering the big picture presented by these six initiatives and focusing specifically on their ability to benefit Latino/a students, in this Article, I advance two conclusions. First, because each of these six initiatives can benefit Latino/a students in a different yet limited way, I advocate the concurrent pursuit of all initiatives. Second, schools, scholars, and lawmakers' abilities to employ race/ethnicity²⁴-conscious policies and analyses is greater in the wake of the Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*²⁵ than it may at first appear, and such an approach continues to have great value.

I. THE ISOLATION AND INTEGRATION OF LATINO/A STUDENTS

Latino/a students have a history of segregation from White students that is different in many ways from the segregation of African American students. Language has played a prominent role in this history, whether used as an explicit proxy for race/ethnicity, a race/ethnicity-neutral cover for invidious isolation, or a legitimate justification for de facto segregation of a portion of the Latino/a population.²⁶ During the past forty years, a tension between bilingual education and racial/ethnic integration has emerged not only because the two concepts have competed for students and political support, but also because at times these initiatives have competed for limited available funding.²⁷ This Part first examines those issues then builds on that historical foundation by discussing Latinos/as' contemporary educational experiences, thus providing a crucial foundation for discussing the efficacy of policy and litigation remedies for the educational inequity experienced by many Latino/a students today.

24. I use "race/ethnicity" rather than merely employing one term or the other. While the two terms are often conflated, historically we have used "race" to refer to immutable characteristics and "ethnicity" to refer to shared culture. My choice to use both is based on the understanding that they are separate concepts which both come into play in tangled ways when discussing Latinos/as especially. *See supra* note 21.

25. 555 U.S. 701 (2007).

26. *See infra* Part I.A.

27. By the mid-1970s, scholars, researchers, policymakers, and educators were starting to recognize and engage the potential conflict between desegregation and bilingual education. The conflict they acknowledged was not only the integration-separation divide, but also that the two policies often would occur simultaneously in poorer districts with limited funding to fully pursue either. RUBEN DONATO, *THE OTHER STRUGGLE FOR EQUAL SCHOOLS: MEXICAN AMERICANS DURING THE CIVIL RIGHTS ERA* 128-29 (1997); *see also* Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 280 (1999) ("Bilingual programs often push in the direction of segregating students who might at the same time be subject to desegregation orders."); Joy Ann Williamson, Lori Rhodes & Michael Dunson, *A Selected History of Social Justice in Education*, 31 *REV. RES. EDUC.* 195, 212 (2007) (describing the theoretical and historical underpinnings of this conflict).

A. *A Historical Perspective*

This Part is organized chronologically. Its goals are to highlight the statutes, cases, regulations, and social changes which have been most influential in the pursuit of educational equity and equality²⁸ for Latinos/as and to explore the relationship between Latinos/as' and African Americans' struggles for educational equality and equity as they have evolved over time. In substantial part, this is the story of the desegregation and bilingual education movements—at times dovetailing, at other times coming into direct conflict—but it is also a story of larger sociolegal shifts.

1. 1920s–1950s: Early Segregation Victories for Latinos/as Premised on the “Other White” Strategy

Records about Latinos/as' struggles for equality and equity stretch back in time, but it is not until the early twentieth century that we have records of the formal discrimination against Latinos/as in public schools.²⁹ Thus, this section begins there.

From the 1920s through the 1940s, some aspects of Latinos/as' experiences in the American South were similar to the Jim Crow experiences of African Americans: Latinos/as were subject to lynching; excluded from White restaurants, parks, swimming pools, and cemeteries; and restricted from buying property owned by Whites.³⁰ Discrimination against Latinos/as also infiltrated public schools: for example, a Texas statute enacted in 1919 provided that “all school business” except foreign language classes must be conducted in English.³¹ Under this statute, which was not repealed until 1969, children were punished for speaking Spanish in school,³²

28. These two terms can be differentiated at a very general level as follows: “equality” focuses on treating individuals the same, whether or not they are similarly situated. By contrast, “equity” assumes that groups of individuals are *not* similarly situated, and thus supports different treatment of these groups with the proverbial goal of leveling the playing field. NANCY KRANICH, *EQUALITY AND EQUITY OF ACCESS: WHAT'S THE DIFFERENCE?* 1 (2005), <http://www.ala.org/ala/aboutala/offices/oif/iftoolkits/toolkitrelatedlinks/equalityequity.cfm>.

29. Prior to the early twentieth century, de facto segregation may have been quite common. See Williamson et al., *supra* note 27, at 199.

30. See Lupe S. Salinas, *Linguaphobia, Language Rights, and the Right of Privacy*, 3 STAN. J. C.R. & C.L. 53, 65–66 (2007).

31. Act of May 13, 1933, ch. 125, § 1, 1933 Tex. Gen. Laws 325, 325–36, *repealed by* Act of May 22, 1969, ch. 289, § 4, 1969 Tex. Gen. Laws. 871, 872. Salinas, *supra* note 30, at 65 n.65, 66.

32. Salinas, *supra* note 30, at 65 n.65, 66; see also Margaret E. Montoya, *Law and Language(s): Image, Integration and Innovation*, 7 LA RAZA L.J. 147, 148 (1994)

revealing a “public hostility” toward the Spanish language which continues to some extent today.³³ Additionally, during the first half of the twentieth century, Texas did not bother itself with enforcing the mandatory attendance law for Latinos/as.³⁴ Furthermore, when Latinos/as did enroll in public schools, school officials routinely segregated them from White students on the basis of their surnames, purportedly assuming that they needed English language instruction—regardless of whether they actually were English-proficient or not.³⁵

This same practice of surname-based segregation occurred in Lemon Grove, California and gave rise to the first school desegregation case in the United States in which the court enforced a remedy for plaintiffs. That case, *Alvarez v. Owen*,³⁶ grew out of a school district’s decision in 1930 to abandon its previous practice of educating all children in the same school building, and instead educating the Latino/a children in a barn-like structure on the edge of town, separate from the White children.³⁷ Disputing the district’s decision, Latino/a parents sued the school district on their children’s behalf and won on the basis of the “other White” strategy.³⁸ Over the next couple of decades, Latinos/as often employed this strategy, arguing that because they were classified as White by law, school districts could not justifiably segregate some White students (Latinos/as) from other White students (Anglos).³⁹ Not surprisingly,

(discussing several examples in the legal literature and from personal history of similar punishments in Arizona and New Mexico).

33. Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 150, 167 (2007) (“Both public and private schools, particularly those in the Southwest, have a notorious history of punishing schoolchildren for speaking Spanish on school grounds.”); Montoya, *supra* note 32, at 148.

34. James Thomas Tucker, *The Battle over “Bilingual Ballots” Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 563 (2008).

35. *Id.* at 563–65 (describing this phenomenon in Texas and Arizona); Bowman, *supra* note 18, at 1773 (describing this phenomenon in California).

36. No. 66625 (Cal. Super. Ct. San Diego County filed Apr. 17, 1931).

37. Bowman, *supra* note 18, at 1770–71.

38. *Id.* (explaining that because Latinos/as were neither African nor Indian, their segregation was not justified).

39. See, e.g., Phoebe C. Godfrey, *The “Other White”: Mexican Americans and the Impotency of Whiteness in the Segregation and Desegregation of Texan Public Schools*, 41 EQUITY & EXCELLENCE EDUC. 247, 250–51, 253 (2008); Richard R. Valencia, *The Mexican American Struggle for Equal Educational Opportunity in Mendez v. Westminster: Helping to Pave the Way for Brown v. Board of Education*, 107 TCHRS. C. REC. 390, 418 (2005); Steven H. Wilson, *Brown Over “Other White”: Mexican Americans’ Legal*

throughout the 1950s and 1960s and especially after the Supreme Court's decisions in *Brown v. Board of Education* in 1954⁴⁰ and 1955,⁴¹ segregationists came to employ the "other White" strategy as well, designating Latinos/as as White and enrolling Latinos/as in schools with African American students to create schools they claimed were racially integrated.⁴² Of course, in communities with a critical mass of both African Americans and Latinos/as, this practice regularly created one set of schools in which African Americans and Latinos/as were concentrated and another set for Whites (Anglos).

2. 1960s: Trading the "Other White" Strategy for the Protections of Federal Civil Rights Legislation

In part because the "other White" strategy began to backfire, during the 1960s, Latino/a activists more or less abandoned it in favor of a distinctly Latino/a, non-White/non-Black categorization. This involved Latinos/as arguing that they should be considered as a distinct, identifiable group in the same way that Whites and African Americans were, and not combined with Whites or African Americans for litigation or remedy purposes.⁴³ This change in litigation strategy also reflected changes in Latino/a communities at the time.⁴⁴ Latino/a student enrollment was still small—only around two million students in the United States at the end of the 1960s⁴⁵—and Latinos/as were only rarely included in the rapidly growing number of southern school desegregation plans.⁴⁶

Arguments and Litigation Strategy in School Desegregation Lawsuits, 21 LAW & HIST. REV. 145 *passim* (2003); Wilson, *supra* note 22, at 213.

40. 347 U.S. 483 (1954).

41. 349 U.S. 294 (1955).

42. See, e.g., ORFIELD & LEE, NEW FACES, OLD PATTERNS?, *supra* note 13, at 5; Godfrey, *supra* note 39, at 254 (discussing desegregation in Houston); Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1086 (1997); Valeriano Saucedo, *Civility, Respect, and Life Experience: A Latino Perspective from the Bench*, 13 BERKELEY LA RAZA L.J. 51, 51 (2002); Richard R. Valencia, Martha Menchaca & Ruben Donato, *Segregation, Desegregation, and Integration of Chicano Students: Old and New Realities*, in CHICANO SCHOOL FAILURE AND SUCCESS: PAST, PRESENT, AND FUTURE 71, 90 (Richard Valencia ed., 2002) [hereinafter CHICANO SCHOOL FAILURE AND SUCCESS].

43. Tom I. Romero, II, *MALDEF and the Legal Investment in a Multi-Colored America*, 18 BERKELEY LA RAZA L.J. 135, 137 (2007).

44. *Id.* at 136–37. Gerald Torres and Lani Guinier describe the "other White" classification as a "racial bribe" inviting a group to distance itself from African Americans and move toward Whiteness. GUINIER & TORRES, *supra* note 20, at 224–29.

45. ORFIELD & LEE, HISTORIC REVERSALS, *supra* note 13, at 16.

46. FRANKENBERG, LEE & ORFIELD, A MULTIRACIAL SOCIETY, *supra* note 13, at 32; ORFIELD & LEE, HISTORIC REVERSALS, *supra* note 13, at 23.

Latinos/as' marginality in educational equity struggles was not limited to desegregation litigation, however. In 1964 the Federal Civil Rights Act became law.⁴⁷ The Act invested the U.S. Department of Health, Education, and Welfare (the predecessor to the contemporary Department of Education) with the authority to enforce Title VI of the Civil Rights Act, a provision prohibiting intentional discrimination and policies which have a disparate impact in federally funded education settings.⁴⁸ The Civil Rights Act, like the Civil Rights movement out of which it grew, focused primarily on African Americans' rights; thus, at first the Department of Health, Education, and Welfare did not interpret Title VI to protect Latinos/as nor did it even keep records identifying Latinos/as as a group separate from Whites.⁴⁹

By contrast, during this time, Latinos/as did begin to achieve success in their struggles to secure some English language instruction for ELL students, the vast majority of whom were (and continue to be) Latino/a. Up until the 1950s and 1960s, students who did not speak English were expected to acquire English fluency through "submersion."⁵⁰ This practice is what it sounds like: children who spoke little or no English were placed into classes conducted entirely in English, were submersed in the language, and would effectively sink or swim.⁵¹ During the 1960s, some schools began to provide ELL students with English language instruction that was actually structured, and among other things, these new programs used the students' native language to help teach them English.⁵² This shift was immensely important in the long term, but in the short term it generated some backlash: communities with ELL Latino/a students at times were reluctant to provide bilingual education for fear that their towns would be overrun by Latinos/as and would also suffer White

47. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

48. Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163, 165 (1999).

49. Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 271-74 (2007); Wilson, *supra* note 22, at 209-10.

50. Kelly Bikle, Kenji Hakuta & Elsa S. Bilings, *Trends in Two-Way Immersion Research*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 589, 591 (James A. Banks & Cherry A. McGee Banks eds., 2004).

51. *Id.*

52. See generally *id.* (describing the creation of new ESL programs in the 1950s and 1960s and highlighting that these programs deviated from the traditional sink-or-swim approach).

flight.⁵³ However, the emerging English language instructional norms eventually would have staying power in part because they were buttressed by a new federal law. The Bilingual Education Act of 1968⁵⁴ was the first piece of federal legislation to provide funding for schools to teach English to students who were not English-proficient, although it did not obligate states and schools to accept the funding or provide such instruction.⁵⁵

In sum, during the 1960s, racial integration and structured English language instruction were emerging as distinct aspects of what it meant to create equitable educational opportunities for non-White students. By the end of the 1960s, these strands would start to intertwine as Latinos/as brought lawsuits alleging that the Corpus Christi, Texas, school district⁵⁶ and the Denver, Colorado, school district⁵⁷ illegally segregated Latino/a students and provided them insufficient English language instruction. These two cases were the first to draw national attention to the interplay between the unconstitutional segregation of Latinos/as and the inadequate attention to Latinos/as' English language instructional needs. Both of these cases would play out throughout the next decade.

3. 1970s: Desegregation and Bilingual Education Litigation Take Off, and Some Conflicts Emerge

During the 1970s, both the desegregation litigation and the bilingual education movements gained momentum. Given that many school districts were required to pursue desegregation goals and to provide English language instruction to a degree they had not done before, it is not surprising that the conflict between the two policies began to crystallize, illuminating tensions which remain to this day.⁵⁸

53. Michelle R. Wood, Note, *ESL and Bilingual Education as a Proxy for Racial and Ethnic Segregation in U.S. Public Schools*, 11 J. GENDER RACE & JUST. 599, 617 (2008).

54. Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783, 816-20 (1968) (codified as amended in scattered sections of 20 U.S.C.).

55. Moran, *supra* note 48, at 167; James Crawford, *Obituary: The Bilingual Ed Act, 1968-2001*, RETHINKING SCHOOLS ONLINE, Summer 2002, http://www.rethinkingschools.org/archive/16_04/Bil164.shtml.

56. *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 324 F. Supp. 599, 606 (S.D. Tex. 1970); Wilson, *supra* note 39, at 181-95.

57. *Keyes v. Sch. Dist. No. 1*, 303 F. Supp. 279, 289 (D. Colo. 1969) (granting preliminary injunction), *modified*, 303 F. Supp. 289 (D. Colo. 1969).

58. This conflict is a question this Article will engage repeatedly, but sadly, given school districts' financial constraints, it is probably one that will never be resolved satisfactorily.

Prior to the late 1960s, courts generally had not categorized Latinos/as as a distinct group protected by civil rights laws. As mentioned above, many school districts classified Latino/a students as White for desegregation purposes, sometimes with an overseeing court's consent.⁵⁹ Thus, the district courts' holdings in *Cisneros v. Corpus Christi*⁶⁰ (Corpus Christi, Texas) and *Keyes v. School District No. 1*⁶¹ (Denver, Colorado), in 1969 and 1970, respectively, were significant departures from school desegregation precedent of the time: these courts held that Latinos/as were an identifiable ethnic minority group protected by *Brown* and were also separate from Whites and African Americans.⁶²

In 1973, desegregation officially came to the North via the Supreme Court's decision in *Keyes v. School District No. 1*⁶³ which held, significantly, that de jure segregation could result from a series of practices or local decisions motivated by discriminatory intent, even if the segregation was not codified. *Keyes* also profoundly changed Latinos/as' relationship to school desegregation litigation across the country because in *Keyes*, the Supreme Court affirmed the lower courts' holdings that Latinos/as were an identifiable group protected by *Brown*.⁶⁴ At the same time, the Supreme Court in *Keyes* did not go so far as to require a triracial/ethnic remedy in which Whites, African Americans, and Latinos/as would be considered separately. Thus, lower courts in subsequent years applied *Keyes* by classifying African Americans and Latinos/as together as non-White.⁶⁵ The Supreme Court's decision in *Keyes* also did not make any preliminary statements about the contested relationship between

59. See *supra* note 42 and accompanying text.

60. 324 F. Supp. 599, 606 (S.D. Tex. 1970).

61. 303 F. Supp. 279, 289 (D. Colo. 1969).

62. Godfrey, *supra* note 39, at 255. Prior to the litigation, the Denver school district enrolled Latinos/as in classrooms with African American students and called the classrooms desegregated. DONATO, *supra* note 27, at 124.

The Supreme Court decided a case about jury discrimination involving Latinos/as at the same time as it was deciding *Brown*, yet the Court's recognition of Latinos/as as a minority group in *Hernandez v. Texas*, 347 U.S. 487 (1954), in 1954 was not applied by the Supreme Court or lower courts in contexts such as education. Bowman, *supra* note 18, at 1764–66.

63. 413 U.S. 189 (1973). “[I]n the case of a school system like Denver’s, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.” *Id.* at 198.

64. *Id.* at 197 (“We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment.”).

65. See, e.g., Bowman, *supra* note 18, at 1777–81.

integration and English language instruction, which was left to the mercy of the lower courts.⁶⁶

A few years earlier, in 1970, the Department of Health, Education, and Welfare had issued a memorandum to school districts interpreting Title VI of the Civil Rights Act as protecting ELL students.⁶⁷ Most importantly, the department required school districts to “take affirmative steps to rectify the language deficienc[ies]” when those deficiencies effectively barred children from receiving an education.⁶⁸ A 1972 U.S. Commission on Civil Rights study determined that

[only] 6.5 percent of the public schools in the Southwest offered bilingual education; [only] 2.7 percent of the Chicano⁶⁹ student population was being served in these programs . . . [therefore] about one in forty Chicano students in the five Southwestern states were being served in bilingual education classes, although about one in two first graders were likely in need of such services⁷⁰

The available programs and services continued to grow throughout the 1970s, and during this time many language minority communities began to benefit from the first comprehensive English language instruction programs school districts had ever offered. Yet, because these programs usually required non-native English speakers to be concentrated with one another for purposes of English language instruction, they conflicted with some aspects of aggressive desegregation remedies which sought systemic racial and ethnic balance of students within school districts.

66. M. Beatriz Arias, *The Impact of Brown on Latinos: A Study of Transformation of Policy Intentions*, 107 TCHRS. C. REC. 1974, 1980 (2005).

67. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595, 11,595 (July 17, 1970).

68. *Id.* The memorandum also required school districts: (1) to ensure they were not misidentifying students as needing special education because of students’ language limitations or denying Limited English Proficient (“LEP”) students access to college preparatory classes if such denial was due to a language limitation the district should have rectified; (2) to be aware that language instruction “must not operate as a dead-end track”; and (3) to notify LEP parents about school activities in a manner they can understand, even if this means providing a translation. *Id.* at 11,595–96.

69. “Chicano” describes an American-born man with Mexican heritage. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 213 (11th ed. 2003). Given the time of this report, it is likely that the report’s authors are using “Chicano” to refer to males and females of Mexican descent, whether American-born or foreign-born.

70. Richard Valencia, *The Plight of Chicano Students: An Overview of Schooling Conditions and Outcomes*, in CHICANO SCHOOL FAILURE AND SUCCESS, *supra* note 42, at 3, 8.

Despite the Court's protection of Latinos/as' desegregation interests in *Keyes*, the legal requirements regarding English language instruction were still in flux. In 1974 alone, however, three significant events occurred. First, in January, the Supreme Court decided *Lau v. Nichols*,⁷¹ upholding the Office of Civil Rights' ("OCR")⁷² interpretation that Title VI of the Civil Rights Act required school districts to take "affirmative steps" to remedy students' language deficiencies.⁷³ Second, in August, Congress reauthorized and amended the Bilingual Education Act, for the first time explicitly permitting English-proficient students to enroll in bilingual classes in order to advance cultural understanding and to reconcile the goals of desegregation and bilingual education.⁷⁴ This change also suggested that bilingualism was an asset for native English speakers.⁷⁵ Third, as part of the same bill which reauthorized the Bilingual Education Act, Congress passed the Equal Educational Opportunities Act ("EEOA").⁷⁶ The EEOA codified the Court's "affirmative steps" holding from earlier that year in *Lau*.⁷⁷ Because of these three events, in less than a year the formal legal regime affecting ELL students changed radically.

Soon thereafter, in 1975, OCR issued guidelines interpreting *Lau* as favoring bilingual programs which included native-language

71. 414 U.S. 563 (1974).

72. OCR was then a division of the Department of Health, Education, and Welfare and is a subdivision of the Department of Education today. See U.S. Dep't of Educ. Office for Civil Rights, Overview of the Agency, <http://www2.ed.gov/about/offices/list/ocr/index.html?src=mr> (last visited Jan. 26, 2010).

73. *Lau*, 414 U.S. at 568; see, e.g., Rachel F. Moran, *Undone by Law: The Uncertain Legacy of Lau v. Nichols*, 16 BERKELEY LA RAZA L.J. 1, 4-5 (2005) (arguing that *Lau* appears weakened by both *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983) and *Alexander v. Sandoval*, 532 U.S. 275 (2001) and that it may well come out differently if decided today).

74. Education Amendments of 1974, Pub. L. 93-380, §§ 702(a), 703(a)(6), 88 Stat. 474, 503, 505 (codified as amended in scattered sections of 20 U.S.C.); Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners' Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL'Y 539, 551 (2007).

75. Li, *supra* note 74, at 551-52.

76. Equal Educational Opportunities Act of 1974, Pub. L. 93-380, § 259, 88 Stat. 514, 521 (1974) (codified at 20 U.S.C. § 1232g (2006)).

77. Civil Rights Division, U.S. Dep't of Justice, Equal Opportunities Section Frequently Asked Questions, <http://www.usdoj.gov/crt/edo/faq.php#4> (last visited Feb. 2, 2010) ("The EEOA prohibits specific discriminatory conduct, including segregating students on the basis of race, color or national origin, and discrimination against faculty and staff. Furthermore, the EEOA requires school districts to take action to overcome students' language barriers that impede equal participation in educational programs.").

instruction, arguably going further than the requirements of *Lau*.⁷⁸ For several years, the Department of Health, Education, and Welfare used these guidelines when formulating hundreds of consent agreements;⁷⁹ federal courts applied these guidelines as well.⁸⁰ In 1978, shortly before the end of this tumultuous decade, Congress again reauthorized the Bilingual Education Act.⁸¹ In a measure which appeared to some to be a step back from earlier policy declarations, the reauthorization emphasized that the purpose of bilingual education should be transitioning non-native-English speakers into English language instruction.⁸²

Toward the end of the 1970s, parents of language minority students publicly opposed desegregation decrees in some communities, in favor of more concentrated English language instruction programs;⁸³ in other communities, parents attempted to intervene in desegregation litigation to ask courts to balance the interests of desegregation and ELL students. Latino/a parents were granted intervenor status in ongoing desegregation suits in Denver,

78. Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1280–83 (1988) (discussing OCR's implementation of *Lau*).

79. The Federal General Educational Provisions Act authorizes the Department of Education

to enter into a compliance agreement with a recipient that is failing to comply substantially with Federal program requirements Section 457 of [General Educational Provisions Act] authorizes the U.S. Department of Education (the Department) to enter into a compliance agreement with a recipient that is failing to comply substantially with Federal program requirements. In order to enter into a compliance agreement, the Department must determine, through written findings, that the recipient cannot comply with the applicable program requirements until a future date and that a compliance agreement is a viable means of bringing about such compliance.

Notice of Written Findings and Compliance Agreement with the New Hampshire Department of Education, 73 Fed. Reg. 4319, 4320 (Jan. 23, 2009). If the recipient agrees to modify its actions, policies, etc. to come into compliance, the Department may enter into this informal compliance agreement with the recipient rather than withholding funds or ultimately litigating against the recipient. 20 U.S.C. § 1234(c) (2006). Thus, the compliance agreement process is an important part of the Department's law enforcement activities. For a further description of this process, see Notice of Written Findings and Compliance Agreement with the New Hampshire Department of Education, 73 Fed. Reg. at 4319–31.

80. Moran, *supra* note 78, at 1283.

81. Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143 (codified as amended in scattered sections of 20 U.S.C.).

82. *Id.* § 702, 92 Stat. at 2268–69 (codified at 20 U.S.C. § 3222 (2001)).

83. Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1338 (2008).

Colorado; Detroit, Michigan; Los Angeles, California; Madison Park, Massachusetts; New York, New York; Waterbury, Connecticut; and likely other places, as well.⁸⁴ Chinese American parents were granted intervenor status in San Francisco, California.⁸⁵ In some school districts, courts struggled to balance bilingual education needs with integration goals.⁸⁶ In other districts, bilingual programs were framed as segregating students and gave way to the goal of racial integration.⁸⁷ Ultimately, between 1972 and 1975, the Mexican American Legal Defense and Education Fund (“MALDEF”)⁸⁸ initiated thirty-nine school desegregation lawsuits—not an insignificant number, especially for this type of case—but even when considering this litigation activity, scholars describe the organization as prioritizing bilingual education policy and litigation over school integration.⁸⁹ Finally, perhaps reflecting the public’s and courts’ ambivalence about how Latinos/as fit within the goals of school desegregation, social science desegregation research during this time did not identify Latino/a students as a distinct group.⁹⁰ Unfortunately for Latinos/as, this was the “most productive period of empirical research on the effects of desegregation on school outcomes,” and it completely passed them by.⁹¹

4. 1980s Through the Present

During the 1960s and 1970s, Latinos/as began to benefit from expanding educational equity rights via statutes, doctrine, and regulations. In the thirty years since, many progressive social changes have occurred, but in general the rights-based framework provided by law has contracted.

84. Joaquin G. Avila, *Equal Educational Opportunities for Language Minority Children*, 55 U. COLO. L. REV. 559, 561–62 (1984); Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 518–19 (1982); Moran, *supra* note 83, at 1338, 1340; see Moran, *supra* note 42, at 1086.

85. Moran, *supra* note 83, at 1338, 1340.

86. Avila, *supra* note 84, at 561–62; Tom I. Romero II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 115 (2004); Bowman, *supra* note 18, at 1791–92.

87. DONATO, *supra* note 27, at 129.

88. See MALDEF, Mission Statement, <http://maldef.org/about/mission> (last visited Feb. 22, 2010).

89. Arias, *supra* note 66, at 1979; Romero, *supra* note 43, at 142; Scott, *supra* note 8, at 127. MALDEF was in strange company, joined by the Nixon administration, among others. FRANKENBERG, LEE & ORFIELD, A MULTIRACIAL SOCIETY, *supra* note 13, at 19–20.

90. Arias, *supra* note 66, at 1978.

91. *Id.*

Legal changes with regard to English language instruction since the 1970s have been substantial. First, in the early 1980s, the U.S. Department of Education withdrew the *Lau* guidelines which had stated that instruction in a student's native language was an important part of English language instruction.⁹² Second, around the same time, Congress amended the Bilingual Education Act to explicitly accept Structured English Immersion ("SEI") pedagogy, thus endorsing a method of English language instruction which involved very little communication in the student's native language.⁹³ Third, during the late 1980s, Congress amended the Bilingual Education Act to increase funding for SEI programs and also to put a three-year limit on students' enrollment in bilingual programs, thus restricting financial support for English language instruction programs which in part used a student's native language.⁹⁴ These three changes constituted a retreat from the progressive legal changes made in prior decades.

The most well-known ELL case of the 1980s was not necessarily part of this retreat, although it permitted a great deal of deference to school districts' English language instruction choices and thus allowed for the possibility that an SEI program could satisfy the EEOA. The Fifth Circuit's 1981 decision in *Casteneda v. Pickard*⁹⁵ held that the EEOA's "appropriate action" inquiry contained three parts: (1) whether the school district's English language instruction program is based on "the soundness of educational theory or principles" according to experts in the field; (2) "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school;" and (3) whether the program is an effective practice in this school district and helps students overcome language barriers.⁹⁶ This three-part analysis has remained the seminal test for determining EEOA compliance for over twenty-five years, although it was modified somewhat by the Supreme Court's 2009 decision in *Horne v. Flores*.⁹⁷ Except for the routine reauthorization of the Bilingual Education Act in 1994, Congress had little to say about English

92. Moran, *supra* note 78, at 1293–96.

93. Eugene E. Garcia & Ann-Marie Wise, *Language, Public Policy, and Schooling: A Focus on Chicano English Language Learners*, in CHICANO SCHOOL FAILURE AND SUCCESS, *supra* note 42, at 149, 154–55; Moran, *supra* note 78, at 1306–14.

94. Garcia & Wise, *supra* note 93, at 155.

95. 648 F.2d 989 (5th Cir. 1981).

96. *Id.* at 1009–10.

97. 129 S. Ct. 2579 (2009). For a discussion of *Horne v. Flores*, see *infra* Part II.C.

language instruction during the 1990s. Toward the end of the 1990s, though, some major English language instructional changes started happening at the state level: California voters approved a proposal requiring SEI (colloquially known as “English-only instruction”) for ELL students across California.⁹⁸

The next major change to the legal landscape occurred in 2001, when Congress passed the No Child Left Behind Act (“NCLB”);⁹⁹ President George W. Bush signed the bill into law in January 2002. NCLB repealed the Bilingual Education Act but left the EEOA untouched.¹⁰⁰ Pursuant to NCLB, ELL students must participate in standards-based testing, and they may be tested in their native language only during the first three years they are enrolled in public schools in the United States.¹⁰¹ After this time, they must be tested in English.¹⁰² (Some argue that because of these changes as well as changes in grant funding, NCLB has the effect of favoring SEI over other bilingual and language instruction programs.¹⁰³) NCLB also requires that school districts communicate regularly with parents of ELL students about their child’s academic experience and future expectations about the child’s English proficiency.¹⁰⁴

98. In an unusual, fleeting step, a federal district court prevented the implementation of Proposition 227 in the San Jose school district for which it was overseeing a remedy. See Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 571 n.420 (1999) (citing *U.S. Judge Rejects English-Only Measure*, WASH. POST, Aug. 19, 1998, at A18) (explaining that Proposition 227 would not be implemented in San Jose, making San Jose the only school district that could continue its language program).

99. No Child Left Behind Act, 20 U.S.C. §§ 1041–1044, 3427, 6052, 6053e, 6054b, 6055h, 6056a (2006) (amending the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–6578).

100. Crawford, *supra* note 55.

101. Drew H. Gitomer, Jolynne Andal & Derek Davison, *Using Data to Understand the Academic Performance of English Language Learners*, 21 POL’Y ISSUES 1, 3 (2005).

102. Additionally, ELL students’ performance on standards-based tests is disaggregated from other students’ performance; students also are disaggregated from race/ethnicity, disability, and poverty. *Id.*

103. STEVEN W. BENDER ET AL., *EVERYDAY LAW FOR LATINO/AS* 3, 78 (2008). “[M]any language disputes seek the right to speak Spanish in settings that include school classrooms.” *Id.* at 3. NCLB assumes that English proficiency can be developed in three to five years, after which time LEP students receive English language tests. *Id.* at 78; Li, *supra* note 74, at 560 (“[NCLB] is slowly and quietly weakening the most effective method of ensuring that ELL students can attain both English proficiency and academic content.”). This reflected a political movement in various states during the early 2000s in which ballot initiatives led to states requiring that elementary and secondary schools use SEI in California, Arizona, and Massachusetts. BENDER ET AL., *supra*, at 3.

104. Each year, a school must promptly inform the parents of an ELL student that the child has been identified as needing ELL services and explain why this is so; explain the child’s “level of English proficiency, how such level was assessed, and the status of the

Finally, it is important to note that students' English language instruction rights are not enforceable through litigation alone. OCR has the authority to initiate an investigation of whether a school district is in compliance with EEOA and, if the district is not, to negotiate a binding compliance agreement which will remedy the deficiencies.¹⁰⁵ OCR has not shied away from this opportunity: it currently oversees compliance agreements involving ELL students in approximately seventy-five school districts across the country.¹⁰⁶ Furthermore, at least one prominent attorney who represents school boards across the country expects that OCR will be conducting EEOA compliance reviews with increasing regularity.¹⁰⁷

Additionally, school desegregation limitation has also changed significantly over the past thirty years, and Latinos/as' and ELL students' relationships with this line of cases have continued to be tenuous. In 1980, the Sixth Circuit declared in the Detroit desegregation case *Bradley v. Milken*¹⁰⁸ that "when the choice is between maintaining optimal conditions in a bilingual education program and desegregating all-black schools, desegregation must prevail."¹⁰⁹ In 1984, the Supreme Court decided one of the most notable cases of the 1980s, *Plyler v. Doe*,¹¹⁰ involving both Latino/a ethnic isolation and language segregation, but was silent on both issues in a decision ultimately based on illegal immigrant children's right to education. In 1991, the Supreme Court's decision in *Board of Education of Oklahoma City v. Dowell*¹¹¹ changed the landscape for school desegregation, sanctioning piecemeal unitary status

child's academic achievement"; explain the pedagogical method of the ELL program in which the child is or will be enrolled as well as describe other pedagogical methods of ELL instruction; explain "how the program will specifically help their child learn English, and meet age appropriate academic achievement standards for grade promotion and graduation"; state "specific exit requirements for the program" and make clear the expected rate of transition into mainstream classrooms and the expected graduation rate. Maree F. Sneed & Jon Borkowski, Hogan & Hartson LLP, Presentation to Education Law Association: Legal Issues with Respect to Immigrant Students and English Language Learners (Oct. 22, 2009) (presentation handout on file with the North Carolina Law Review).

105. *Id.*; see Mary Ann Zehr, *Under Federal Pressure, District Addresses ELLs*, EDUC. WK., June 10, 2009, at 1, 12.

106. Zehr, *supra* note 105, at 1.

107. Sneed & Borkowski, *supra* note 104 (comment by Maree Sneed).

108. 620 F.2d 1143 (6th Cir. 1980).

109. *Id.* at 1154.

110. 457 U.S. 202 (1982); see Nina Rabin, Mary Carol Combs & Norma Gonzalez, *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J.L. & EDUC. 15, 51 (2008).

111. 498 U.S. 237 (1991).

declarations.¹¹² However, *Dowell* did not protect or discuss the rights of Latino/a children in Oklahoma City or in other districts where public schools' demographics had changed significantly during the course of court oversight, whether because of a growing Latino/a population or another reason.¹¹³

The Supreme Court's latest school integration decision occurred in 2007. In that case, *Parents Involved in Community Schools v. Seattle School District No. 1*,¹¹⁴ the Court reviewed the voluntary student assignment plans that school districts in Seattle, Washington, and Louisville, Kentucky, had implemented with the goal of increasing the racial/ethnic diversity within their public schools.¹¹⁵ The plurality opinion of four justices held that creating diverse classrooms was not a compelling interest for elementary and secondary schools,¹¹⁶ and furthermore, that the school districts' use of race in certain student assignment decisions was not necessary to achieve the goal of creating increasingly diverse classrooms.¹¹⁷ Justice Kennedy concurred in part,¹¹⁸ parting ways with the majority on the compelling interest question,¹¹⁹ and for different reasons than the plurality, also concluded that the plans were not narrowly tailored to achieve the goal of diversity.¹²⁰ The decision was a blow to civil rights advocates.¹²¹

B. The Current Situation

This brings us to the present day and to the present section, which begins with a discussion of Latinos/as' general demographic characteristics. It then provides a snapshot of Latinos/as' experiences today regarding educational achievement, English language

112. *Id.* at 246, 249–50.

113. ORFIELD & LEE, HISTORIC REVERSALS, *supra* note 13, at 9, 14.

114. 551 U.S. 701 (2007).

115. The plans were voluntary as opposed to part of a mandatory court-ordered desegregation remedy. *Id.* at 709–10. Further, the plans only authorized the consideration of race/ethnicity in limited circumstances and did not call for a comprehensive overhaul in the assignment of students. *Id.*

116. *Id.* at 720–33.

117. *Id.* at 733–34.

118. Justice Kennedy's concurrence may come to have a role similar to Justice Powell's concurrence in the most well-known affirmative action/education case of the 1970s: *Regents of the University of California v. Bakke*. 438 U.S. 265 (1978). Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 504 n.164 (2009).

119. *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring).

120. *Id.* at 787.

121. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 131–34 (2007).

proficiency, racial/ethnic isolation in schools as well as in communities, and future population projections.

1. Latinos/as' General Demographic Characteristics

In 2006, Latinos/as were the largest racial/ethnic minority group in the United States, comprising 15% of the U.S. population; this was roughly 3% more than the African American portion of the U.S. population.¹²² In twenty-two states across the country, Latinos/as are now the largest racial/ethnic minority group in the public schools.¹²³ Between 1990 and 2006, Latino/a students accounted for 64% of the net increase in the student population.¹²⁴ Compared to other racial/ethnic groups, a larger portion of Latinos/as are of school age: of all Latinos/as in the United States, 34% are under the age of eighteen, compared to 18% of African Americans and 14% of Whites.¹²⁵ Population estimates predict continued rapid growth among the Latino/a population; the group's higher-than-average birth rate and its young population both contribute to this forecast.¹²⁶

122. American Community Survey, U.S. Census Bureau, C03001: Hispanic or Latino Origin by Specific Origin – Universe, Total Population (2006) [hereinafter U.S. Census Bureau: C03001], <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C03001”); U.S. Census Bureau, C02003: Race – Universe: Total Population (2006), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C02003”). According to the U.S. Census Bureau, 64% of Latinos/as in the United States are of Mexican origin, followed by 9% with Puerto Rican heritage, 8% Central American (excluding Mexico), 6% South American, 4% Cuban, and 3% from the Dominican Republic. U.S. Census Bureau: C03001, *supra*. The remaining 7% of Latinos/as in the United States trace their ancestors to areas of the world other than those listed immediately above. *Id.* Within the Latino/a school-age population, children of Mexican heritage are even more overrepresented when compared to other Latino/a subgroups (69%, compared to 64% of the entire Latino/a population). U.S. Census Bureau, Table 2: Population by Sex, Age, and Hispanic Origin Type: 2008 (2008), <http://www.census.gov/population/www/socdemo/hispanic/cps2008.html>.

123. FRY & GONZALES, *supra* note 7, at ii.

124. *Id.* at i.

125. American Community Survey, U.S. Census Bureau, C01001: Sex by Age (Hispanic or Latino) (2007), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C01001”); U.S. Census Bureau, Table 4: Annual Estimates of the Black or African American Alone Population by Sex and Age for the United States: April 1, 2000 to July 1, 2007 (2008), <http://www.census.gov/popest/national/asrh/NC-EST2007-asrh.html>; U.S. Census Bureau, Table 4: Annual Estimates of the White Alone Population by Sex and Age for the United States: April 1, 2000 to July 1, 2007 (2008), <http://www.census.gov/popest/national/asrh/NC-EST2007-asrh.html>.

126. Darnell Little & Mary Ann Fergus, *Birth Rates Drive Rise in Latinos*, CHI. TRIB., Sept. 12, 2007, at 7.

Over the past three and a half decades, the percentage of Latino/a students in each region of the country increased as follows:

*Table 1. Percentage of Student Population That Is Latino/a, by Region (1972–2006)*¹²⁷

	1972 (% of student population)	2006 (% of student population)
Midwest	1.5%	7.7%
Northeast	5.5%	15.3%
South	5.0%	18.8%
West	15.3%	36.9%

As this table demonstrates, the Latino/a population has been growing throughout the United States. In part, this growth has occurred in states with already large, established Latino/a populations: Arizona, California, Colorado, Illinois, New Jersey, New Mexico, New York, Pennsylvania, and Texas.¹²⁸ These nine “established” Latino/a states enroll roughly three-fourths of all Latino/a students in the United States.¹²⁹

Most of the remaining 25% of Latino/a students live in “new” and “emerging” Latino/a states. The “new” Latino/a states—which enroll a total of 13% of all native-born and 21% of all foreign-born Latino/a students—are Florida, Georgia, Massachusetts, Nevada, North Carolina, Oregon, Virginia, and Washington.¹³⁰ The twelve “emerging” Latino/a states enroll only 8% of foreign-born Latino/a students, but they all have very rapidly growing, though still numerically small, Latino/a populations: Arkansas, Indiana, Kansas, Maryland, Minnesota, Nebraska, New Hampshire, Oklahoma, Rhode Island, Tennessee, Utah, and Wisconsin.¹³¹ The new and emerging Latino/a states have more foreign-born than native-born Latinos/as, although only 16% of the Latino/a public school population in the

127. NAT’L CTR. FOR EDUC., U.S. DEP’T OF EDUC., STATISTICS, THE CONDITION OF EDUCATION 2008, at 86–87 (2008) [hereinafter THE CONDITION OF EDUCATION 2008], available at <http://nces.ed.gov/pubs2008/2008031.pdf>.

128. FRY & GONZALES, *supra* note 7, at 15.

129. *Id.*

130. *Id.* at 15–16.

131. *Id.* at 16.

United States is foreign-born.¹³² Together, the new and emerging states are considered the site of the “New Latino/a Diaspora,” which consists primarily of Mexican and Central American immigrants.¹³³

Historically, Latino/a national origin-based subgroups often have been concentrated in various parts of the United States—Puertorriqueños/as in New York, Cuban/as in Florida, Chicanos/as and native-born Mexicans in California, Texas, and across the Southwest.¹³⁴ This also is beginning to change due to recent immigration and migration patterns discussed above.¹³⁵ While the geographic distance among national origin groups may be more obvious, the social distance among these groups is less visible, but at least as strong. The largest Latino/a sub-groups—people with Mexican, Puerto Rican, and Cuban heritages—often have little or no contact with one another.¹³⁶ As the Latino/a population grows, the differences both between and within Latino/a subgroups become ever more apparent.¹³⁷

132. See *id.* at 17; see also Massey, *supra* note 15, at 460 (“Immigration . . . lies at the heart of Hispanic population dynamics, and it is impossible to make a firm statement about the social, economic, or demographic position of Latinos without taking it into account.”). Whether in established, new, or emerging Latino/a states, a significant number of extended Latino/a families contain native- and foreign-born members, and documented and undocumented individuals. Rabin et al., *supra* note 110, at 48–49.

133. Richard R. Valencia, *The Explosive Growth of the Chicano/Latino Population: Educational Implications*, in CHICANO SCHOOL FAILURE AND SUCCESS, *supra* note 42, at 52, 65.

134. Sandrino-Glasser, *supra* note 21, at 75–77.

135. For example, Cuban Americans comprise 5% of the Florida electorate, outnumbered by “other” Latinos/as, who together comprise 6%. NDN, HISPANICS RISING II: AN OVERVIEW OF THE EMERGING POLITICS OF AMERICA’S HISPANIC POPULATION 32 (2008), available at <http://ndn.org/sites/default/files/paper/hispanicsrising-ii.pdf> (last visited Feb. 4, 2010).

136. Welch & Sigelman, *supra* note 20, at 80 (“When Mexican, Puerto Rican, and Cuban respondents were asked how much contact they had with members of the other two Latino groups, in five of six instances the modal response was ‘none.’ Most Mexicans reported no contact whatsoever with either Puerto Ricans or Cubans, and most Cubans and Puerto Ricans reported none with Mexicans.”).

137. Margaret E. Montoya & Francisco Valdes, “Latinas/os” and Latino and Latina/o Legal Studies: A Critical and Self-Critical Review of Lat-Crit Theory and Legal Models of Knowledge Production, in TWELFTH ANNUAL LATCRIT CONFERENCE 5 (2007) (“[D]iscursive mis/conceptions of the ‘Latino/a’ condition . . . flatten group identity into familiar but misleading stereotypes.”); see also Johnson, *supra* note 22, at 1267 (“If Mexican-Americans are a diverse group, Latinos are even more so. Mixtures of race, national origin, immigration status, class, culture, education, political outlook, and many other characteristics abound.”). In Douglas Massey’s words, Latinos/as are “a disparate collection of national origin groups with heterogeneous experiences of settlement, immigration, political participation, and economic incorporation into the United States.” Massey, *supra* note 15, at 454.

2. Latinos/as' Educational Experiences Today

This Part turns to a more detailed examination of Latinos/as' educational experiences, discussing data which will provide context for the litigation and policy initiatives discussed later in this Article. The first section, regarding Latinos/as' achievement, connects in one way or another to all six initiatives.¹³⁸ The second section, English language proficiency rates, is most closely related to the subsequent discussions of EEOA litigation and English language instructional alternatives, though it is also connected in a complicated way to the integration initiatives.¹³⁹ The third and fourth sections, racial and ethnic isolation in schools and communities, relate to desegregation and school finance litigation, and in part to multifactor socioeconomic status integration.¹⁴⁰ Finally, population projections bear most heavily on the civil rights recordkeeping discussions.¹⁴¹

a. Achievement

Turning first to achievement, statistics provide a snapshot of the educational challenges many Latinos/as face. For example, Latino/a students have higher dropout rates than any other group: 22.1%, compared to 5.8% for Whites and 10.7% for African Americans; the dropout rate among Latinas is especially high.¹⁴² Undoubtedly, this results from many factors, including the role models students see in their racial/ethnic communities of origin. Current Latino/a students' parents have lower high school completion rates than any other group: around 60% compared with roughly 88% of African American students' parents and 94% of White students' parents.¹⁴³

138. See *infra* Parts II.A–C, Parts III.A–C.

139. See *infra* Part II.A, Part II.C, Parts III.B–C.

140. See *infra* Parts II.A–B, Part III.C.

141. See *infra* Part III.A.

142. This dropout rate for Latinos/as, though high, is the lowest recorded for this group since record-keeping started in 1972. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, FAST FACTS, QUESTION: WHAT ARE THE DROPOUT RATES OF HIGH SCHOOL STUDENTS? (2008), <http://nces.ed.gov/> (follow "Fast Facts" hyperlink; then follow "Elementary/Secondary" hyperlink; then follow "Dropout Rates"). Only 59% of Latinas graduate from high school on time; the remaining 41% drop out, finish high school in five years or more, or get a GED. Catherine Gewertz, *Report Probes Educational Challenges Facing Latinas*, EDUC. WK., Sept. 2, 2009, at 10, 10.

143. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKAN NATIVES: 2008, 14 (2008) [hereinafter STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKAN NATIVES], <http://nces.ed.gov/pubs2008/2008084.pdf> (citing figures in Table 5.3 that document the percentage of children ages 6–18 whose parents had completed high school, by parent and race/ethnicity in 2007).

Those Latino/a students who do stay enrolled consistently perform much worse than White students but not as poorly as African American students on standards-based tests across subjects and across grade levels.¹⁴⁴ The education policy literature speculates about many reasons for Latino/a students' lower levels of achievement including language barriers; many Latino/a immigrants' limited previous education; Latinos/as' lower socioeconomic status on average; their concentration in poorer school facilities providing fewer educational opportunities; their limited social capital and similarly limited ability to acquire it; often higher rates of residential mobility; schools' efforts to assist Latinos/as focused on affluent and already-high-achieving Latinos/as; and, at times, a feeling of alienation from school due to being taught by Anglo and African American teachers who are unfamiliar with Latino/a culture.¹⁴⁵ The same literature highlights various education policy changes which have produced greater educational achievement for some Latinos/as:

[T]eachers, counselors, administrators, and support staff placed value on language and culture; held high expectations for students; provided staff development explicit to language-minorities; offered a variety of course options; gave special counseling attention to language-minority students and their parents; and shared a strong commitment to empower these student [M]inority staff were hired in leadership positions to act as role models, courses were provided to Latino language-minority students that did not limit their choices or

144. *Id.* at 52, 56, 59, 61 (analyzing figures in Table 4.2b: Percentage Distribution of Students Across Reading Achievement Levels, by Race/Ethnicity and Grade; Table 4.3b: Percentage Distribution of Students Across Mathematics Achievement Levels, by Race/Ethnicity and Grade; Table 4.4b: Percentage Distribution of Students Across Science Achievement Levels, by Race/Ethnicity and Grade; and Table 4.5b: Percentage Distribution of Students Across U.S. History Achievement Levels, by Race/Ethnicity and Grade).

145. Carlos J. Ovando, *Beyond "Blaming the Victim": Successful Schools for Latino Students*, 30 EDUC. RESEARCHER 29, 29 (2001) ("[T]he teachers in charge of Hispanic students continue to be mostly White, middle class females with very limited multicultural and multilingual competencies and experiences."); Robert K. Ream, *Counterfeit Social Capital and Mexican-American Underachievement*, 25 EDUC. EVALUATION & POL'Y ANALYSIS 237, 237-38 (2003); Gary M. Stern, *School Policy and Attitude Cut Hispanic Achievement*, EDUC. DIG., May 2004, at 39, 40-41 (discussing how Latino/a parents value education but lack the cultural capital to help their children succeed and discussing schools' focus on affluent and high-achieving Latinos/as to the detriment of other Latinos/as).

Some of these factors are easier to address than others. For example, building teachers' cultural competency so they can more effectively engage their Latino/a students is not easy, but it is much easier than addressing issues such as residential mobility.

trap them in low-level curricula, students were offered basic as well as advanced courses that were taught through bilingual and sheltered methods, parents were involved with counselors in planning their children's course schedules, and staff took part in the political process that challenged the status quo.¹⁴⁶

As with underachievement in any demographic group, there is not a quick fix for addressing the achievement gap between White students and Latinos/as. None of the policy changes listed above is a silver bullet. But if we are serious about decreasing the Latino/a dropout rate and increasing Latinos/as' achievement, it may be necessary to acknowledge that the dominant culture in many schools is not one to which some Latinos/as naturally respond. Changing aspects of that culture will involve changing policies, developing new programs, training teachers, and many other things—things that cost money.¹⁴⁷ Thus, understanding the potential impact of some of these policies can play a role in developing race/ethnicity-conscious cost studies.¹⁴⁸

b. English-Language Proficiency

The vast majority of Latino/a students are English proficient. However, native Spanish speakers comprise about 75% of all the students in U.S. public schools who are *not* English proficient.¹⁴⁹ Accordingly, English language instruction is an issue of particular importance to many Latinos/as—and not just the foreign-born: by one estimate, 57% of all ELL students are native-born.¹⁵⁰ A few years ago,

146. Reuben Donato & Carmen de Onis, *Mexican Americans in Middle Schools: The Illusion of Educational Reform*, 33 THEORY INTO PRAC. 173, 178 (2004); see also Ovando, *supra* note 145, at 30 ("Embedded in this strong pro-student stance is the notion that schools must create learning environments that are culturally and linguistically responsive while simultaneously expanding the horizons of their students.").

147. For example, a Texas school district spent a half-million dollars of its 2009 federal stimulus money on training staff and teachers about diversity. Karel Holloway, *Garland ISD to Use \$500,000 of Stimulus Funds on Diversity Training*, DALLAS NEWS, Oct. 8, 2009, available at http://www.dallasnews.com/sharedcontent/dws/dn/education/stories/DN-garstimulus_08eas.ART.Central.Edition1.4be41fd.html.

148. See *infra* notes 233–37 and accompanying text (discussing total absence of racially/ethnically-conscious cost studies, which would be needed to support color-conscious school finance litigation).

149. FRY & GONZALES, *supra* note 7, at 13. Of all students' homes in which English is not spoken, Spanish is spoken in nearly three-quarters of the homes. *Id.* at 11. Chinese, French, and Hindi each are spoken in about 2–3% of these homes. *Id.* In the remaining 10% of homes, families speak many languages although no other language is spoken in more than 2% of the homes. *Id.*

150. JEANNE BATALOVA, MICHAEL FIX & JULIE MURRAY, MEASURES OF CHANGE: THE DEMOGRAPHY AND LITERACY OF ADOLESCENT ENGLISH LANGUAGE LEARNERS

Richard Valencia described Mexican American ELL students as a “highly significant but often overlooked and underserved” population and identified crucial issues states will face with increasing frequency: the current and growing challenges of having too few bilingual teachers, questions about segregation for the purpose of language instruction, and changing methods of language instruction.¹⁵¹ Additionally, ELL students’ drop-out rates are higher than non-ELL students in all thirty-eight states which track ELL graduation rates and in the District of Columbia.¹⁵²

Interestingly, estimates of what percent of Latino/a students are ELL students vary widely, from 18% to 45%.¹⁵³ Even relying on the

13 (2007), available at http://www.migrationpolicy.org/pubs/Measures_of_Change.pdf (noting that native-born students include those who were born in Puerto Rico, since they are U.S. citizens).

Not surprisingly, the rate of English fluency differs between foreign- and native-born Latinos/as. One study estimates that among first-generation Latino/a immigrant students, 44% are ELLs; among children of immigrants this declines to 20%; and among grandchildren of immigrants it is 5%. FRY & GONZALES, *supra* note 7, at iv. This generational trend in English language acquisition is consistent with other research, but the numbers seem low given research about Latino/a ELLs. American Community Survey, U.S. Census Bureau, B16005I: Nativity by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Older (Hispanic or Latino) (2007), <http://www.factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “B16005I”) (finding that of all native-born Latinos/as over age four, 5% speak English “not well” or “not at all” compared to 48% of foreign-born Latinos/as).

151. Valencia, *supra* note 133, at 63.

152. Mary Ann Zehr, *Graduation Rates on ELLs a Mystery*, EDUC. WK., Sept. 16, 2009, at 1, 20–21.

153. According to the Pew Hispanic Center, 18% of Latino/a students are Limited English Proficient (LEP). FRY & GONZALES, *supra* note 7, at iv. The National Council on Education Statistics (NCES) reports that 36.3% of Latino/a students are LEP. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKAN NATIVES, *supra* note 143, at 108. The National Council of La Raza (“NCLR”) contends that 45% of Latino/a students are LEP. Jamal Abedi, Carolyn Hofstetter & Carol Lord, *Assessment Accommodations for English Language Learners: Implications for Policy-Based Empirical Research*, 74 REV. OF EDUC. RES. 1, 4 (2004); see also Jamal Abedi, *The No Child Left Behind Act and English Language Learners: Assessment and Accountability Issues*, 33 EDUC. RESEARCHER 4, 5 (2004) (“The NCLB defines LEP students as . . . owing to the difficulty in speaking, writing, or understanding English, not meeting the state’s proficient level of achievement to successfully achieve in English-only classrooms.”).

Much of the nearly twenty percentage-point discrepancy among these estimates is likely explained by the organizations’ different definitions of what constitutes “proficiency.” Using varying definitions is understandable given that neither the U.S. Department of Education’s regulations nor relevant federal statutes define “ELL” or “proficiency.” Rather, these terms are defined at the state and local level. Although the U.S. Census does use a consistent definition of ELL, and the Department of Education uses Census Bureau data to allocate most of the available NCLB-Title III funds, this

most conservative numbers, though, the ELL population is growing rapidly. According to one estimate, between 1995 and 2005 the ELL student population grew by almost 60% to reach 5.1 million, while the overall U.S. public school enrollment increased by a little less than 4% to slightly more than forty-nine million.¹⁵⁴ Like Latino/a population growth generally, ELL population growth has not occurred equally across all regions of the United States. In the Midwest, ELL students are estimated to make up 3.1% of the public school population, compared to 4.4% in the Northeast, 4.6% in the South, and 8.6% in the West.¹⁵⁵ More specifically, in the decade leading up to 2005, the ELL student population more than tripled in Alabama, Arkansas, Colorado, Georgia, Indiana, Kentucky, Mississippi, Nebraska, New Hampshire, North Carolina, Tennessee, and Virginia.¹⁵⁶

ELL students' experiences vary based on many factors. In the five states which serve 70% of the entire ELL population nationally (Arizona, California, Florida, New York and Texas), ELL students are concentrated in large urban school districts. In these districts and

definition may overestimate English proficiency because it relies on spoken language skills only, without regard to evaluating reading or writing. BATALOVA ET AL., *supra* note 150, at 28, 49–50. For example, the Pew Hispanic Center (which reports the lowest percentage of ELLs) focuses on “speaking” English less than “very well,” not on reading comprehension or writing, and takes its data from self-reported census data. Telephone Interview with Richard Fry, Senior Research Assoc., Pew Hispanic Ctr. (Apr. 21, 2009) (on file with the North Carolina Law Review).

The NCES calculations (the mid-range numbers) are based on data that states report to the U.S. Department of Education pursuant to NCLB, thus reflecting the number of students that states classify as ELLs using their varying definitions of proficiency. Any number of factors could explain the discrepancy between the NCES and NCLR calculations, but the most likely culprits could be if schools under-identify students as LEP; schools move LEP students out of ELL programs (and thus ELL classification) before they have attained proficiency; and, because the Latino/a dropout rate is higher than other groups, with the non-English-proficient dropout rate being highest of all, the NCLR calculation could include school-age ELL students rather than enrolled students. Additionally, before NCLB required states to account for the performance of their ELL students, only four states required school districts to be accountable for the achievement of their ELL students. MELISSA LAZARIN, *IMPROVING ASSESSMENT AND ACCOUNTABILITY FOR ENGLISH LANGUAGE LEARNERS IN THE NO CHILD LEFT BEHIND ACT 2* (2006), available at <http://www.nclr.org/content/publications/download/37365>.

154. NAT'L CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION, DEP'T OF EDUC., *THE GROWING NUMBERS OF LIMITED ENGLISH PROFICIENT STUDENTS: 1995/96–2005/06*, at 1 (2008) [hereinafter *THE GROWING NUMBERS OF LIMITED ENGLISH PROFICIENT STUDENTS*].

155. *THE CONDITION OF EDUCATION 2008*, *supra* note 127, at 92.

156. *THE GROWING NUMBERS OF LIMITED ENGLISH PROFICIENT STUDENTS*, *supra* note 154, at 1.

others, ELL students most often attend schools which have larger total enrollments, high proportions of students in poverty, and (at least at the middle-school level) higher student-to-teacher ratios.¹⁵⁷ These are challenging educational conditions for a student proficient in English, let alone one who is not.

c. Racial/Ethnic Isolation in Schools

Many Latino/a students attend schools in which the majority of the students live in poverty,¹⁵⁸ and the majority of the students are Latino/a. Some of this racial/ethnic isolation is due to the demographic makeup of communities, some to attendance zones within districts, and some to district boundaries themselves.

In 2008 Latinos/as were concentrated in high-minority schools in slightly higher percentages (56%) than African Americans (50%) overall, and when schools were disaggregated by their location in cities, suburbs, towns, and rural areas, Latinos/as' concentration in high-minority schools also outpaced African Americans'.¹⁵⁹ Furthermore, there is little diversity among "minorities" in "high-minority" schools: in 2005–06, the average Latino/a student attended a school that was 27% White, 12% African American, 55% Latino/a, 5% Asian, and 1% American Indian.¹⁶⁰ Similarly, the average African American student attended a school that was 30% White, 52% African American, 14% Latino/a, 3% Asian, and 1% American Indian.¹⁶¹ Gary Orfield and Erica Frankenburg describe these levels of educational segregation for Latinos/as as "the highest recorded in the forty years these statistics have been collected" and for African Americans as "back to what it was in the late 1960s, before serious urban desegregation began."¹⁶²

These statistics reflect a general demographic pattern: metropolitan areas with 30% or more African Americans rarely have

157. RICHARD FRY, THE ROLE OF SCHOOLS IN THE ENGLISH LANGUAGE LEARNER ACHIEVEMENT GAP, at i–iv (2008), available at <http://pewhispanic.org/files/reports/89.pdf>.

158. In 2008, nearly half of Latino/a students were concentrated in high-poverty schools, a slightly higher percentage than African Americans overall. THE CONDITION OF EDUCATION 2008, *supra* note 127, at 49, 152. When schools were disaggregated by community type, this same dynamic held true in cities and suburbs, but not in towns and rural areas where a greater percentage of African Americans were concentrated in high-poverty schools. *Id.*

159. *Id.* at 50, 153.

160. ORFIELD & LEE, HISTORIC REVERSALS, *supra* note 13, at 24.

161. *Id.*

162. ORFIELD & FRANKENBURG, THE LAST HAVE BECOME FIRST, *supra* note 13, at 2–3.

substantial Latino/a populations, and vice versa. Miami and New York are the only two major metropolitan areas with substantial concentrations of both African Americans and Latinos/as.¹⁶³ Yet, the racial/ethnic isolation of individual students varies substantially based on type of community. According to demographer Chad Farrell, it appears that “suburban municipalities are functioning in much the same way as city neighbourhoods when it comes to the residential sifting and sorting of White and minority populations in the suburban ring.”¹⁶⁴ In fact, within urban areas, much of the racial isolation of individual students can be attributed to neighborhood-level racial/ethnic isolation.¹⁶⁵ And, within larger metropolitan areas, most of students’ racial isolation can be attributed to school district boundaries.¹⁶⁶

Before turning to the racial/ethnic isolation of communities, it is necessary to engage one additional misconception: often, racial/ethnic educational segregation is assumed to be caused primarily by racially/ethnically disparate levels of wealth and poverty and related residential wealth segregation. While some parts of that assumption hold true, one often overlooked factor affecting this dynamic is that affluent children are more likely to attend private schools, especially

163. Ron Johnston, Michael Poulsen & James Forrest, *Blacks and Hispanics in Urban America: Similar Patterns of Residential Segregation?*, 12 POPULATION, SPACE & PLACE 389, 393 (2006).

164. Chad R. Farrell, *Bifurcation, Fragmentation or Integration? The Racial and Geographic Structure of US Metropolitan Segregation, 1990–2000*, 45 URB. STUD. 467, 480 (2008).

165. *Id.* at 473. Public schools in the nation’s one hundred largest school districts have an average enrollment of 30% White students (non-Latino/a) and 70% non-White students (African Americans, Latinos/as, Asian Americans, Native Americans, Native Alaskans, Pacific Islanders). NAT’L CTR. FOR EDUC. STATISTICS, DEP’T. OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2003–04, at A18–19 (2006). In these large districts, nearly half the public schools have an enrollment that is 81–100% non-White. *Id.* Only 8% of the public schools in these districts have an enrollment that is up to 20% White. In major urban school districts, Latinos/as are the largest racial/ethnic group; these districts educate roughly one-fifth of all Latino/a students in the United States. ANURIMA BHARBAVA, ERICA FRANKENBERG & CHINH LE, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES (UCLA), STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION 13 (2008). In those districts, 65% of Latinos/as are enrolled in schools that have at least half Latino/a students, while in suburban districts, only 49% of Latinos/as are. THE CONDITION OF EDUCATION 2008, *supra* note 127, at 155.

166. Sean F. Reardon, John T. Yun & Tamela McNulty Eitle, *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989–1995*, 37 DEMOGRAPHY 351, 358 (2000).

if their neighborhood public school is economically balanced¹⁶⁷—and private school enrollment nationwide is made up mostly of White students (75% of all private school students), compared to much smaller numbers and percentages of African American students (10%), Latinos/as (9%), Asian Americans (5%), and Native Americans (1%).¹⁶⁸ Therefore, even in a racially, ethnically, economically diverse neighborhood, White children are more likely to attend private schools, thus skewing the local public school's enrollment so that it is more of-color and poorer than the neighborhood itself.¹⁶⁹

As this section has discussed, for many complex reasons, racially/ethnically isolated public schools are hardly a thing of the past.

d. Racial/Ethnic Isolation in Communities

Because the demarcations of urban neighborhoods and the boundaries between suburban municipalities play such an important role in creating diverse or non-diverse schools, it is important to examine the fluidity of those communities. Accordingly, this section discusses Latinos/as' recent immigration and migration patterns.

The starting point for this examination is the traditional minority group spatial assimilation model, which assumes that first generation immigrants move to an urban core area and that individual second and third generation immigrants or small families move from that urban core area into nearby middle-class suburban neighborhoods which are more racially/ethnically integrated.¹⁷⁰ Over time, Mexican immigrants are especially likely to follow the traditional spatial assimilation model.¹⁷¹ But, a number of demographers have noted the

167. Salvatore Saporito & Deenesh Sohoni, *Mapping Educational Inequality: Concentrations of Poverty Among Poor and Minority Students in Public Schools*, 85 SOC. FORCES 1227, 1247 (2007).

168. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKA NATIVES, *supra* note 143, at 43.

169. See Saporito & Sohoni, *supra* note 167, at 1246–47.

170. Farrell, *supra* note 164, at 472.

171. Scott J. South, Kyle Crowder & Erick Chavez, *Migration and Spatial Assimilation Among U.S. Latinos: Classical Versus Segmented Trajectories*, 42 DEMOGRAPHY 497, 497 (2005). In fact, much of the native- and foreign-born Latino/a populations remain concentrated in urban core areas. FRY & GONZALES, *supra* note 7, at 1. This concentration is in line with traditional patterns of minority group immigration and assimilation. Mexican immigrants may be following this path more than other Latino/a subgroups, except Puerto Ricans, who appear especially geographically isolated in urban areas. Mary J. Fischer, *The Relative Importance of Income and Race in Determining Residential Outcomes in U.S. Urban Areas, 1970–2000*, 38 URB. AFF. REV. 669, 685 (2003)

limited ability of the traditional model to explain current immigration and settlement practices.¹⁷² New residential patterns are developing: for example, suburbs increasingly are becoming home to racial/ethnic minorities, including Latinos/as in ways not anticipated by the spatial assimilation model.¹⁷³

The scholarship of urban residential racial isolation is extensive¹⁷⁴ and examination of suburban isolation is developing, but the examination of racial/ethnic minorities' settlement in small towns and rural areas is still in its early stages.¹⁷⁵ This emerging literature already provides useful information about Latinos/as, however. Spanish-speaking immigrants are moving to small towns and rural areas with increasing frequency, especially in the new and emerging Latino/a

("Segregation experienced by blacks is almost twice as high as that experienced by Hispanics and nearly three times as high as that experienced by those in the residual Asian and others category."); South et al., *supra*, at 497. See generally Massey, *supra* note 15, at 459 (discussing the urban underclass and the evolving urban models and theories of poverty that differ for Hispanics when compared with Blacks).

172. Farrell, *supra* note 164, at 472.

173. Throughout the 1990s minorities appeared to be concentrated in a relatively small number of suburbs. Richard C. Jones, *The Ambiguous Roles of Suburbanization and Immigration in Ethnic Segregation: The Case of San Antonio*, 29 URB. GEOGRAPHY 196, 217 (2008); Reardon et al., *supra* note 166, at 361.

174. Douglas Massey and Nancy Denton's five criteria for determining hypersegregation have been employed in numerous studies since 1989; the criteria focus on whether members of a group "are *unevenly distributed* across neighborhoods; . . . highly *isolated* within very racially homogenous neighborhoods; their neighborhoods are *clustered* to form contiguous ghettos, *centralized* near central business districts and away from suburban schools and jobs, and *concentrated* in terms of population density and spatial area compared to white neighborhoods." Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 798 (1995) (citing Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373 (1989)). Based on these criteria, African Americans have been hypersegregated at vastly higher rates than Latinos/as, Asian Americans, or Native Americans. *Id.*; Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century*, 41 DEMOGRAPHY 23, 29 (2004). This may change with the advent of new paradigms for assessing hypersegregation. See, e.g., Ron Johnston, Michael Poulsen & James Forrest, *Ethnic and Racial Segregation in U.S. Metropolitan Areas, 1980–2000*, 42 URB. AFF. REV. 479, 497–98 (2007) ("1. Unevenness, isolation, and clustering, or *separateness*— . . . the degree to which members of the ethnic group live apart from the remainder of the population in a coherent block of urban territory; and, 2. Concentration and centralization, or *location*— . . . the degree to which members of the group are congregated (irrespective of their degree of isolation) into high-density, inner-city areas."). Still, summarizing the research from the early 1970s through the early 2000s, scholars concluded that "Hispanics have become noticeably more segregated over time, whereas Blacks have become somewhat less." Johnston et al., *supra* note 163, at 397, 405; see also Jones, *supra* note 173, at 198, 199 (explaining that over time, studies have found less segregation among Blacks).

175. Jones, *supra* note 173, at 197.

states.¹⁷⁶ Additionally, the “unprecedented demographic influx of foreign-born” Latinos/as has been more prevalent in the rural Midwest and South.¹⁷⁷ Furthermore, the residential patterns of Latinos/as’ geographic isolation in non-urban are occurring for a variety of reasons which emphasize the diversity among Latino/a subgroups. Higher status Cuban immigrants who are on average older than other Latino/a subgroups may opt into an enclave community;¹⁷⁸ lower status Mexican immigrants may settle into temporary housing in small towns near food-processing plants;¹⁷⁹ disadvantaged immigrants of various backgrounds may move directly to largely homogenous suburbs rather than following the traditional spatial assimilation model of settling in the city and later migrating to the suburbs and/or more diverse communities.¹⁸⁰ And, many of the communities in which the Latino/a population is growing most rapidly also are facing the highest rates of increasing residential racial/ethnic segregation.¹⁸¹

Although general demographic changes are not always reflected precisely in the public schools,¹⁸² understanding communities’ demographic changes can help school districts, advocates, and parents develop a more nuanced understanding of the racial/ethnic isolation in particular school districts and work to address this isolation.

176. *Id.* (“[D]estinations being chosen by immigrants are increasingly smaller metropolitan areas, some distance from the traditional gateways located at the margins of the national territory.”); Daniel T. Lichter et al., *National Estimates of Racial Segregation in Rural and Small-Town America*, 44 *DEMOGRAPHY* 563, 563 (2007) (“[S]ystematic analyses of recent, national patterns of racial residential segregation in America’s small cities and towns are currently lacking.”). “Hispanics, unlike blacks, have recently moved in disproportionate numbers into relatively small communities, including single-industry communities with labor-intensive meat- or poultry-processing plants.” *Id.* at 574–75.

177. Lichter et al., *supra* note 176, at 563.

178. Jones, *supra* note 173, at 199 (“[This trend is] especially noticeable for higher-status Chinese, Filipinos, Japanese, Asian Indians, and Cubans.”); see also Farrell, *supra* note 164, at 473 (discussing how suburban segregation may be largely a function of self-selection resulting from desire for an ethnically cohesive community).

179. Lichter et al., *supra* note 176, at 564, 575 (“[S]mall towns (mostly in the Midwest and South) . . . have experienced heavy influxes of Mexican-origin Hispanics, mostly to work in meat- and other food-processing plants.”).

180. Jones, *supra* note 173, at 196 (“[N]ew trends in urban residential location [show] . . . disadvantaged and newly arrived groups move directly to the suburbs where they may re-segregate rather than disperse.”).

181. Johnston et al., *supra* note 163, at 405.

182. For example, residential segregation is not a proxy for school segregation. Many common-sense factors explain this discrepancy: not all residents have school-age children, not all children attend public schools, the school-age population is more racially and ethnically diverse than the total population, and school district boundaries often are independent of other municipal boundaries. Reardon et al., *supra* note 166, at 352–53.

Furthermore, when school districts are aware of general demographic changes, they are in a better position to proactively serve their student populations, especially as students' English language instructional needs change.¹⁸³

e. Population Projections

One final necessary aspect of discussing Latinos/as' educational experiences is to understand who is included in the category "Latino/a." Part III.A discusses the federal government's current answer to this question in civil rights recordkeeping policies, but it is important to keep in mind that, for various reasons, we may be approaching an end to the time when single-race/ethnicity categories are useful, especially when describing Latinos/as.

First, the diversity among Latinos/as is becoming increasingly evident, as this Article has discussed at various points.¹⁸⁴ Substantial within-group differences are not only becoming more obvious among Latinos/as, though—as an increasing number of Blacks in the United States are immigrants and children of immigrants with different experiences and understandings of race and ethnicity than descendants of American slaves, the Black population arguably is fragmenting as well.¹⁸⁵ Thus, continuing to use singular racial/ethnic categories at times diminishes increasingly important differences among subgroups.

Second, the multiracial population in the United States is increasing rapidly, and sociologists predict that this is likely to continue.¹⁸⁶ Many predict that by 2050, the number of school-age Latino/a children will exceed the number of school-age White children.¹⁸⁷ This conventional population projection and others like it are substantially limited by one of their key assumptions: individuals will marry and procreate only within their own racial/ethnic group.

183. The rapid influx of foreign-born Latinos/as into North Carolina beginning in the late 1990s was part of the primary cause of the unprecedented growth of the ELL population in that state and also was directly connected to the state's severe shortage of ELL services and teachers. THE GROWING NUMBERS OF LIMITED ENGLISH PROFICIENT STUDENTS, *supra* note 154, at 1. North Carolina was not alone: between 1995 and 2005, the LEP student population more than tripled in Alabama, Arkansas, Colorado, Georgia, Indiana, Kentucky, Mississippi, Nebraska, New Hampshire, Tennessee, and Virginia. *Id.*

184. See, e.g., *supra* Introduction, Part I.B.1, I.B.2.d.

185. See Brown & Bell, *supra* note 15, at 1230–31, 1249–50.

186. Barry Edmonston, Sharon M. Lee & Jeffrey S. Passel, *Recent Trends in Inter-marriage and Immigration and Their Effects on the Future Racial Composition of the U.S. Population*, in THE NEW RACE QUESTION, *supra* note 20, at 227 *passim*.

187. See, e.g., FRY & GONZALES, *supra* note 7, at i.

These projections thus do not account for inter-group procreation and resulting multiracial/ethnic offspring,¹⁸⁸ even though already more than 25% of children in at least ten states are multiracial/ethnic.¹⁸⁹ Because Latinos/as' rate of intermarriage (out-group marriage) is much higher than other major racial/ethnic groups' rates¹⁹⁰—this is especially true among second and third generation Latinos/as¹⁹¹—one study anticipates that by 2100, Latinos/as will be the largest racial/ethnic group, exceeding Whites. Yet, the same study projects only 30% of the group identified as Latinos/as will be racially/ethnically “pure” in the sense that an individual's parents share the same singular racial/ethnic identity.¹⁹² Comparatively, 65% of the White population, 63% of the African American population, and 57% of the Asian American population are anticipated to be of singular racial/ethnic origins.¹⁹³ This projection has implications for the much larger questions of how race and ethnicity are defined, and the utility of using single-identity-category designations even for civil rights monitoring in educational settings and elsewhere.¹⁹⁴

II. LITIGATION MOVEMENTS AND LATINO/A STUDENTS

The first Part of this Article provided the sociolegal context for understanding Latinos/as' current struggles for educational equity. Building on that foundation, this Part analyzes three major litigation initiatives which emerged at various points during the twentieth century and have been used at times to benefit Latino/a students. The first of these initiatives, school desegregation litigation, is more commonly thought of as pertaining to African Americans, but in fact Latinos/as' relationship to school desegregation is important

188. Edmonston et al., *supra* note 186, at 227, 228.

189. Debra Viadero, *Mixed Heritage Said to Present Complex Issues*, EDUC. WK., Jan. 21, 2009, at 1, 14.

190. Edmonston et al., *supra* note 186, at 227, 241. Intermarriage rates for African Americans: first generation, 14%; second generation, 12%; third generation, 10%; overall total rate for African Americans' intermarriage in 2000, 10%. Intermarriage rates for Whites: first generation, 10%; second generation, 9%; third generation, 8%; overall total rate for Whites' intermarriage in 2000, 8%. *Id.*

191. *Id.* Intermarriage rates for Latinos/as: first generation, 8%; second generation, 32%; third generation, 57%; overall total rate for Latinos/as' intermarriage in 2000, 30%. *Id.*

192. *Id.* at 247 (stating that the projected total Latino/a population in the year 2100 is 261.2 million, including multiracial/ethnic individuals).

193. *Id.* at 246–47, 250 (stating that the population projections for the year 2100 are: Asian American, 98.2 million; African American, 104.8 million; White, 255.3 million; Latino/a, 261.2 million).

194. See *infra* Part III.A.

historically and presently. The second initiative, school finance litigation, historically has alleged colorblind harms, even though at times it has been motivated by the race/ethnicity-specific effects of disparate financing. However, over the past decade, school finance litigation has started to allege race/ethnicity-specific harms and to seek remedies connected to those harms. Finally, the third initiative, Equal Educational Opportunities Act litigation, has been a mainstay of ELL advocacy for the past thirty-five years. The Court's 2009 decision in *Horne v. Flores*¹⁹⁵ questions some well-established aspects of EEOA doctrine and also has implications for the two other litigation initiatives discussed in this Part.

A. *Desegregation Litigation*

Without contemporary civil rights recordkeeping, we probably would not know specifically how often Latinos/as still attend racially/ethnically isolated public schools. Much of the time these schools do not even contain much diversity among non-White groups, but rather have high percentages of Latinos/as alone.¹⁹⁶ Schools with high percentages of non-White students usually face significant educational challenges, such as "lower test scores, higher dropout rates, less qualified teachers, worse learning environments, more limited curricular offerings, poorer health, less parental involvement, and overall a lower quality of education."¹⁹⁷ Because desegregation litigation is the traditional vehicle for attempting to remedy racially/ethnically isolated public schools, this Part examines its ongoing utility for Latino/a students.

1. Latinos/as' Distance from Desegregation

As the discussion in Part I revealed, Latinos/as have always been a part of the school desegregation movement, although generally they have been on the movement's margins when compared to African Americans. In Gary Orfield and Chungmei Lee's words:

There was never a serious effort to desegregate Latino students In many of the cities most important to Latino students, the cases were never pursued or rapidly dropped The few urban federal orders that did focus on this [group] in California or Texas have been dissolved or are being phased

195. 129 S. Ct. 2579 (2009).

196. *See supra* Part I.B.2.c.

197. Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equity in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 48 (2009).

out. Nothing has been done in the areas where [the] Latino population is now surging, such as North Carolina and Georgia.¹⁹⁸

While this is regrettable to say the least, Latinos/as' distance from school desegregation may be of less importance going forward because of the limited political and legal utility of school desegregation litigation in general. Numerous scholars have written about the political "failure"¹⁹⁹ of desegregation, despite "optimistic" social science evidence about the efficacy of integration, measured by various criteria.²⁰⁰ Regardless, school desegregation lawsuits are rarely filed these days, and with good reason: plaintiffs' ability to bring a successful desegregation suit is limited for reasons both doctrinal and practical.²⁰¹ Beyond that, plaintiffs' ability to secure an effective remedy often is further constrained due to waning political will in support of race/ethnicity-conscious measures.²⁰² Additionally,

198. ORFIELD & LEE, *NEW FACES, OLD PATTERNS?*, *supra* note 13, at 7, 16; *see also* ORFIELD & LEE, *HISTORIC REVERSALS*, *supra* note 13, at 15 (discussing the changing enrollment in public schools).

199. Amy Stuart Wells et al., *Tackling Racial Segregation One Policy at a Time: Why School Desegregation Only Went So Far*, 107 TCHRS. C. REC. 2141, 2142 (2005) ("[P]olitically, school desegregation was a failure. Whites never strongly supported public policies that took away their freedom to choose where and with whom their children attend school. Meanwhile, many African Americans and Latinos/as have grown weary of the various ways in which White resistance to desegregation has manifest itself inside desegregated schools and districts, often making the goal of equal educational opportunity an illusive one."); *see also* Charles Vert Willie & Sarah Susannah Willie, *Black, White, and Brown: The Transformation of Public Education in America*, 107 TCHRS. C. REC. 475, 480 (2005) ("[O]ver the last thirty years, Whites have continued to resist racial integration even as they have begun to embrace the idea of multiculturalism.").

200. Wells et al., *supra* note 199, at 2147 ("[M]uch of the social science research on school desegregation has been optimistic, showing mixed test score results but a positive trend toward higher African American student achievement during the peak years of desegregation, as well as long-term academic and professional gains for African American adults who had attended racially mixed schools A central finding from our study . . . is that the public schools themselves could only achieve limited integration and racial equality in the midst of a segregated and unequal society.").

On a slightly different note, new research reports that "court-ordered school desegregation on average reduces homicide victimization rates by around 25% among school-age blacks, and generates even larger proportional declines in homicide arrests These crime impacts seem to be due at least in part to improved schooling outcomes" David A. Weiner, Byron F. Lutz & Jens Ludwig, *The Effects of School Desegregation on Crime* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 15,380, 2009).

201. Bowman, *supra* note 197, at 49–52.

202. *See, e.g., id.* at 65; Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 953–55, 962–66 (2009); *see also* PEW RESEARCH CTR., *OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS* 35 (2007) (discussing public support for affirmative action policies). *See generally* Chinh Q. Le, *Racially Integrated Education and the Role of the Federal*

for much of the past decade, the Bush administration advanced a policy of pursuing unitary status in school desegregation cases to which the federal government was a party; during that time, nearly 40% of those cases were closed.²⁰³ In sum, although school desegregation litigation used to be a powerful weapon in the fight against educational inequality and inequity, for the most part those days have passed.

2. A Recent Desegregation Lawsuit and Cautionary Tale

To the extent school desegregation litigation continues, many of the remaining successful suits may be more likely to involve Latino/a plaintiffs. This is particularly interesting when juxtaposed with the history of school desegregation, which, as discussed above, generally has neglected to adequately advance Latino/a children's educational interests.²⁰⁴ Discussions about integrating students of different racial/ethnic backgrounds have long been complicated by the limited English proficiency of some students, usually Latinos/as.²⁰⁵

A recent case, *Santamaria v. Dallas Independent School District*,²⁰⁶ provides an example of the unconstitutional segregation of Latinos/as under the pretext of language instruction even today. At an elementary school in North Dallas, nearly all of the Latino/a students were enrolled in bilingual and ESL classrooms even though many of the Latino/a students (especially those in the ESL classes) were proficient in English.²⁰⁷ Sworn testimony revealed that the

Government, 88 N.C. L. REV. 725 (2010) (articulating the federal government's critical role in successful desegregation litigation).

203. When a school district is held liable for unconstitutional discrimination on the basis of race, it is said to be operating a "dual system." The goal of the remedial process is to make the system unitary, rather than dual, to achieve "unitary status" and be released from court oversight. Bowman, *supra* note 197, at 50; Philip T.K. Daniel, *The Not So Strange Path of Desegregation in America's Public Schools*, 56 NEGRO EDUC. REV. 57, 64–65 (2005); Danielle Holley-Walker, *Examining the Effect of Parents Involved on School District Responses to Desegregation Cases*, 88 N.C. L. REV. 877, 882–83 (2010).

204. ORFIELD & LEE, HISTORIC REVERSALS, *supra* note 13, at 15; ORFIELD & LEE, NEW FACES, OLD PATTERNS?, *supra* note 13, at 7, 16; Bowman, *supra* note 18, *passim*; see *supra* Part I.A.

205. See Bowman, *supra* note 18, at 1789–92.

206. Memorandum Opinion & Order, 3:06-CV-692-L (N.D. Tex. Nov. 16, 2006).

207. *Id.* at 18 ("Dr. Gilda Alvarez-Evans (DISD's Assistant Superintendent for the Multi-Language Enrichment Program) created a chart using data generated in April 2006 which shows that in many of the ESL-designated classes, there were more non-LEP Latinos than LEP Latinos, whereas the non-LEP Anglo-Americans were rarely, if ever, similarly assigned to the ESL-designated classes, even though, as testified to by Dr. Evans, they had the same language learning needs as non-LEP Latinos.") (internal citations omitted); see also *id.* at 22–23, 25, 67, 69, 100 (concluding that the school grouped

school principal authorized these classroom-level student assignment practices so the school could market a racially/ethnically-isolated educational experience to affluent White families in the school's surrounding "neighborhood" attendance zone. The marketing was not merely by word of mouth, however; among other things, the school produced and distributed brochures which contained almost no brown faces.²⁰⁸ The federal district court hearing this case in 2006 did not mince words in holding the principal liable for flagrantly violating *Brown v. Board of Education*.²⁰⁹ This is the sort of blatant and unapologetic racial/ethnic discrimination which occurred regularly during the 1920s and 1930s when Latino/a children were routinely segregated from White children in public schools.²¹⁰

One can only hope that this incident in North Dallas was an isolated occurrence, but whether or not this is the case, communities across the country should take note of this situation because it springs out of a relatively common demographic shift. Although Texas has been home to a substantial Latino/a population for many years, it appears that this particular school had not. This school's enrollment changed in a way that large and small communities across the country are experiencing: it had a relatively sudden influx of Latinos/as, some of whom were ELL students. In these situations, school districts may not understand their new students' needs well, but even if they do, nearly all school districts are making policy and pedagogical decisions while under severe financial constraints these days.²¹¹ As in Dallas,

Latinos/as into ESL classes without regard for students' linguistic educational preferences in order to further a discriminatory purpose).

208. *Id.* at 38-44.

209. *Id.* at 19. ("With regard to non-LEP Latino students, the evidence shows non-LEP Latino students and African American students were assigned in grossly disproportionate numbers to the ESL-designated classes without regard to their language abilities, whereas their similarly situated non-LEP Anglo classmates were assigned to the General Education classes. Otherwise stated, the evidence demonstrates that as to those Latino and African American students with identical language learning needs as Anglo students (that is, they were all non-LEP), the non-LEP Latinos and African American students were assigned in a grossly disproportionate manner to ESL-designated classes, while their Anglo peers were assigned, with few exceptions, to 'General Education' classes, also known as 'neighborhood classes,' which were predominantly Anglo.") (emphasis omitted); *see also id.* at 68, 79, 100-01 ("In reserving certain classrooms for Anglo students, Principal Parker was, in effect, operating, at taxpayer's expense, a private school for Anglo children within a public school that was predominantly minority.").

210. Bowman, *supra* note 18, at 1770 (discussing the development of "Latino schools ... in Pasadena (1913), Mendota (1920), Santa Ana (1920), Ontario (mid-1920s), Riverside (unofficial in 1910, but specially built in 1924), and Los Angeles (by 1933)" and the use of isolating "Americanization" programs through the 1950s).

211. *See, e.g.,* Erik W. Robelen, 'Funding Cliff' Fueling Worry Among States, EDUC. WK., Nov. 4, 2009, at 1, 19.

decisionmakers may try to placate some White parents who have political capital and financial resources and who prefer, or at least do not object to, their children having a racially/ethnically isolated education. Although the Latino/a community in Dallas appears to have had some political capital, in many towns and cities, Latino/a communities have virtually none. The potential that a district and/or its employees could unconstitutionally discriminate against a growing Latino/a student population under the guise of providing English language instruction may, in some communities, be unfortunately high.

3. Multigroup Racial/Ethnic Remedies

If plaintiffs do prevail in a desegregation lawsuit, then the district's students must be divided into racial/ethnic groups so that the court and parties can compare students' educational experiences. Historically, in desegregation remedies, students were grouped as Black and White. Then, as Supreme Court doctrine evolved, students were grouped as White and Non-White, and eventually Non-Minority and Minority.²¹² In part, the desire to identify only two groups in a desegregation remedy is understandable—it is much easier to review and compare data for two groups of students than for three or more. As discussed earlier, *Keyes v. Denver School District No. 1*²¹³—decided by the Supreme Court in 1973 and generally known as the case to bring desegregation litigation to the North—was the first nationally high-profile desegregation case to involve a substantial number of Latino/a students and the first to declare that *Brown* protected Latinos/as in addition to African Americans.²¹⁴ Interestingly, the remedy in *Keyes* was multigroup: although the Supreme Court did not require the district court to disaggregate African Americans and Latinos/as for purposes of the remedy, the district court monitored the progress of African Americans and Latinos/as separately, in addition to monitoring White students' progress.²¹⁵ Yet, it seems that in the more than forty years since then, few desegregation remedies have been multiracial/ethnic in this same way.

212. Bowman, *supra* note 18, at 1777–81.

213. 413 U.S. 189 (1973).

214. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1307 (D. Colo. 1995); Bowman, *supra* note 18, at 1777–81.

215. *Keyes*, 902 F. Supp. at 1307.

However, Chief Justice Roberts's plurality opinion and Justice Kennedy's pivotal concurrence in the Supreme Court's 2007 decision striking down voluntary integration, *Parents Involved in Community Schools v. Seattle School District No. 1*,²¹⁶ both arguably provide substantial support for multigroup disaggregation. Like Seattle, Louisville had used two racial/ethnic categories when designing its voluntary (i.e. non-court-ordered) integration policy. In Seattle, the categories were White and non-White; in Louisville, the categories were Black and non-Black.²¹⁷ The use of a binary system of categorization was especially problematic for the Supreme Court: Chief Justice Roberts's plurality opinion was critical of both districts' "limited notion of diversity," noting that two-group-based student assignment easily could avoid creating school-level demographics that reflected the true diversity of the district.²¹⁸ Similarly, Justice Kennedy chastised the Seattle School District for "fail[ing] to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."²¹⁹ Justice Kennedy also concluded that in both Seattle and Louisville, the binary racial/ethnic distinction among students led the plans to fail the narrow tailoring test, given that such a distinction alone would not lead to the district satisfying its goals of creating more diverse school environments, as Chief Justice Roberts had noted in his compelling interest discussion.²²⁰

While these opinions reject voluntary integration plans which are conscious of individual students' race/ethnicity, they also can be interpreted as an important step forward in the Supreme Court's school desegregation jurisprudence. Chief Justice Roberts's and Justice Kennedy's opinions can be employed to encourage the disaggregation of students beyond two racial/ethnic groups, although given the *Parents Involved* general holding that voluntary student assignment plans should not be conscious of individual students' race/ethnicity,²²¹ this likely is only applicable in the trial and remedy phases of desegregation litigation. But still, this holding is advantageous for Latinos/as for two major reasons, even though new

216. 551 U.S. 701 (2007).

217. *See id.* at 723.

218. *Id.* at 723–24, 727 (discussing whether diversity was a compelling interest and concluding that it was not).

219. *Id.* at 786 (Kennedy, J., concurring).

220. *Id.* at 786–87.

221. *See id.* at 733–35 (plurality opinion).

desegregation litigation is rare and many remedial-phase desegregation cases are coming to a close. First, Latinos/as historically have not been considered a separate group for desegregation purposes, and multigroup disaggregation makes visible the physical segregation and divergent educational experiences of Latinos/as, African Americans, Asian Americans, and other members of racial/ethnic minority groups. By doing so, it accords those groups' experiences significance.²²² Second, it allows districts and courts involved in desegregation litigation to more easily account for Latinos/as' greater needs for often-segregated English language instruction, and to monitor the provision of sufficient English language instruction services in concert with creating increasingly diverse learning environments.

B. School Finance Litigation

Battles for educational equity over the past half century have taken many forms. While desegregation litigation has been based on federal law, school finance litigation has been based almost entirely on state law. Such lawsuits have challenged state education funding schemes in nearly every state.²²³ Unlike school desegregation claims, school finance claims can be initiated by students and also by school districts themselves. The first half of this section examines the connections between school desegregation and school finance litigation. The second half discusses a relatively new development: race/ethnicity-conscious school finance litigation.

1. Connections Between School Desegregation Litigation and School Finance Litigation

Just as the history of school desegregation and English language instruction law and litigation are woven together, so too are the histories of school desegregation and school finance litigation intertwined—although it has not been until fairly recently that

222. Even though the current and future utility of using the category “Latino/a” may be limited, the real choice in using this category or not may be between essentializing and conflating Latinos/as' experiences yet creating a visible, sizeable group on one hand; and, on the other hand, merely regarding Latinos/as as a group to be lumped in with all other non-Whites (or, as in Louisville, with all non-Blacks). Primarily because the former option makes Latinos/as' experiences visible, it is arguably a better starting point for continuing to pursue educational equity, at least for now.

223. Only four states have never felt the weight of a school finance lawsuit. John Dinan, *School Finance Litigation: The Third Wave Recedes*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION* 96, 96 (Joshua M. Dunn & Martin R. West eds., 2009).

scholars have explored these connections.²²⁴ In large part, the school finance litigation movement emerged out of dissatisfied desegregation advocates' ideas during the 1950s and 1960s²²⁵ and the school desegregation and school finance movements were driven by the same basic goals: securing educational opportunity for children, usually African American, to whom educational access was most obviously denied.²²⁶

Often, school finance litigation is described as having three "waves": First, plaintiffs' short-lived attempts to bring race/ethnicity-neutral claims based on the federal Equal Protection Clause was rejected by the Supreme Court in 1973 in *San Antonio v. Rodriguez*.²²⁷ Second, race/ethnicity-neutral "equality" claims based on state constitutions' Equal Protection Clauses and Education Clauses were common during the 1970s and 1980s;²²⁸ these claims focused on comparing financial inputs from one district to another.²²⁹ Third, race/ethnicity-neutral "adequacy" claims based on state constitutions' Education Clauses began in the 1990s and still continue; these claims focus on the question of whether education in various districts is financed at a level to ensure the minimal level of a constitutionally adequate education, which each state seems to define differently.²³⁰ In a recent publication, I argued that a fourth wave of school finance litigation based in part on federal anti-discrimination law began to emerge in the mid-1990s, and continues today as well—unlike the previous three waves, the fourth wave is explicitly race/ethnicity-conscious.²³¹ However, the various claims brought

224. See Bowman, *supra* note 197, at 52–56; Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQUALITY 81, 82 (2006); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 254 (1999).

225. Bowman, *supra* note 197, at 52; Ryan, *supra* note 224, at 253; see William J. Glenn, *Separate but Not yet Equal: The Relation Between School Finance Adequacy Litigation and African American Student Achievement*, PEABODY J. EDUC., July 2006, at 63, 66.

226. Bowman, *supra* note 197, at 52–53; Glenn, *supra* note 225, at 64–65, 75; Liu, *supra* note 224, at 83.

227. 411 U.S. 980 (1973); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600 (1994).

228. Thro, *supra* note 227, at 601.

229. *Id.* at 603.

230. *Id.* at 603–04; Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105–06, 175–82 (1995); see also Nat'l Access Network, Recent Litigation Events, http://www.schoolfunding.info/litigation/recent_decisions.php3 (last visited Feb. 2, 2010) (listing and providing links to recent cases regarding school finance reform).

231. Bowman, *supra* note 197, at 58. This occurrence may not be limited to school finance cases alone. Adrian Cowan and Charles Cowan report that "[d]isparate impact

under this expansive “fourth wave” definition have encountered many roadblocks.²³²

2. “Colorblind” or “Color-Conscious”?

Traditionally, school finance litigation plaintiffs allege race/ethnicity-neutral harms, and thus courts order race/ethnicity-neutral remedies.²³³ Accordingly, researchers only rarely engage the idea that school finance litigation may benefit racial/ethnic groups of students in different ways. No scholarship in education policy or school finance literature has considered race or ethnicity as a factor when calculating the constitutionally “adequate” cost of educating children.²³⁴ Yet, as discussed previously, we have some basis for assuming that students of different races/ethnicities at times respond to different pedagogical approaches which come at a higher cost.²³⁵ In the legal literature, James Ryan’s 1999 publication alone engages these connections.²³⁶ In that piece, Ryan evaluated the racial/ethnic demographic profile of school finance plaintiffs and their school districts; he noted the much greater success rate for school finance plaintiffs in predominantly White districts as opposed to plaintiffs in predominantly African American districts.²³⁷ Ryan’s article is an important foundation for these discussions, and more research is needed.

After *Parents Involved*, states and schools may not be able to account for individual students’ race/ethnicity to the extent they could previously, but researchers are not similarly constrained. Plaintiffs in race/ethnicity-conscious school finance litigation need research to support their claims—specifically, they need sophisticated, color-

cases are being filed against cities with increasing frequency, citing the Federal Housing statutes as the basis for the complaints.” Adrian M. Cowan & Charles D. Cowan, *Disparate Impact Analyses: Relevant Numbers, Relevant Populations* 1 (Aug. 3, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443560. Regardless, the tension between equal protection and disparate impact theories is building. Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, CATO SUP. CT. REV. 1 (2009); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. _ (forthcoming 2010).

232. Bowman, *supra* note 197, at 58–63.

233. *Id.*

234. Preston C. Green, III, Bruce D. Baker & Joseph O. Oluwole, *Race-Conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39, 54–55 (2006).

235. See *supra* notes 145–47 and accompanying text.

236. See generally James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999) (explaining that minority school districts have been significantly less successful in school finance litigation).

237. *Id.* at 452–58.

conscious cost studies which estimate the extent to which the cost of educating students varies when students' race/ethnicity is isolated from all other factors. Additionally, researchers and advocates should be race/ethnicity-conscious when broadly evaluating school finance litigation success to include not only a litigation victory but also increasing dollar amounts allocated during a remedial phase, changes brought about by threat of litigation, settlement agreements, cultural changes enabled by legislation or litigation, and other measures of improvement.²³⁸ (In fact, given the larger social costs associated with a school finance litigation victory, a win in the courtroom may not be a win in the long run.²³⁹)

Because state-level school financing schemes are constantly changing, whether because of litigation or for other reasons, research about adequacy is incredibly important. And, because different groups of students may have varying types of educational needs, research about the impact of these changes on Latino/a students is essential in this process.

C. *The Court's 2009 Decision in Horne v. Flores*

The EEOA was enacted in 1974 and has been the primary basis for ELL students to challenge the insufficiency of a school district's English language instruction ever since.²⁴⁰ Although the EEOA is not race/ethnicity-conscious in its design, its current effect is to benefit primarily Latino/a students, who comprise 75% of the ELL population in the United States. As discussed above, an estimated 20–40% of Latino/a students are ELL.²⁴¹ Accordingly, Latinos/as are the group most significantly affected by the outcome in *Horne v. Flores*.²⁴² After discussing *Horne*, this section turns to a consideration of *Horne's* implications for EEOA litigants and others.

1. *Horne* in the District Court and Ninth Circuit

The EEOA's basic requirement that school districts take "affirmative steps" to remedy students' English language deficiencies has, for almost thirty years, been understood to mean that a school

238. See, e.g., Gerald Torres, *Some Observations on the Role of Social Change in the Courts*, 54 DRAKE L. REV. 895, 897 (2006) ("[*Brown*] change[d] the background belief of people who were fighting against discrimination in the South about what was possible.").

239. Bowman, *supra* note 197, at 64–65.

240. Education Amendments of 1974, Pub. L. 93-380, §§ 203, 204, 88 Stat. 484, 514–15 (codified as amended in scattered sections of 20 U.S.C.).

241. See *supra* Part I.B.2.b.

242. 129 S. Ct. 2579 (2009).

district must choose a language instruction pedagogical approach endorsed by educational experts, the district must use an effective program to implement that approach, and the program ultimately must benefit the ELL students in the district.²⁴³ In 1992, Miriam Flores became the lead plaintiff in a lawsuit alleging that the State of Arizona was violating its obligation to ELL students under the EEOA.²⁴⁴ In 2000, the district court hearing this case determined that Arizona had violated the EEOA due to its arbitrary and capricious (and presumably inadequate) funding of English language instruction programs in the Nogales school district, where the plaintiffs' children were enrolled.²⁴⁵ Later that year, the district court ordered the State to perform a cost study to determine the funding necessary to provide services to ELL students in accordance with the EEOA so that English language instruction funding would no longer be arbitrary and capricious, but instead would be data-driven.²⁴⁶ Then, in 2001, at the request of the State of Arizona (one of the defendants), the district court expanded its remedial order beyond Nogales to affect the entire state, concluding that to require funding adjustments for the Nogales district but not others would violate the state constitution's education clause.²⁴⁷

Even after the remedial order was entered, litigation continued, including one appeal to the Ninth Circuit. At the same time, state and local English language instruction policy also kept changing.²⁴⁸ However, the State never conducted the cost study that the district court had ordered in 2000–01.²⁴⁹ In 2006, the district court held an eight day evidentiary hearing and then determined that the EEOA violation persisted and that the State failed to show “compliance with this Court’s decree, much less changed circumstances that would warrant modification or dissolution of this Court’s order.”²⁵⁰ After the

243. *Castaneda v. Pickard*, 648 F.2d 989, 1009–10 (5th Cir. 1981).

244. *Horne v. Flores*, 129 S. Ct. 2579, 2589 (2009); Mark Walsh, *Supreme Court to Hear Case on ELL Funding in Arizona*, EDUC. WK., Jan. 21, 2009, at 20, 20.

245. *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000).

246. *Horne*, 129 S. Ct. at 2590.

247. *Id.* The Arizona Constitution requires the legislature to “enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system.” ARIZ. CONST. art. XI, § 1. The district court interpreted the “general and uniform” provision to require equity throughout the state, and to prevent it from addressing the deficiency in Nogales but not elsewhere. *Horne*, 129 S. Ct. at 2590, 2607.

248. *Flores v. Arizona*, 516 F.3d 1140, 1148–54 (9th Cir. 2008) (describing the activity between 2000 and the 2007 evidentiary hearing); *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *rev’d*, *Flores v. Rzeslawski*, 204 Fed. App’x. 580 (9th Cir. 2006).

249. *Flores v. Arizona*, 480 F. Supp. 2d 1157, 1167 (D. Ariz. 2007).

250. *Id.*

district court issued its opinion and before the Ninth Circuit considered the case again, the U.S. Assistant Secretary of Education advised the Arizona State Superintendent in writing that some aspects of Arizona's new ELL financing scheme violated a federal funding restriction in NCLB.²⁵¹ This restriction—that federal funds may only be used to supplement state funds and cannot supplant any state funding—has been in place since NCLB's predecessor statute, the Elementary and Secondary Education Act, was first adopted in 1965.²⁵² The Ninth Circuit affirmed the district court's denial of relief in a lengthy opinion.²⁵³ The State appealed to the Supreme Court, which granted certiorari.²⁵⁴

2. The Supreme Court's Opinions in *Horne*

Like the 2007 decision in *Parents Involved* and so many other cases over the past few decades, in *Horne*, the Court split five to four. Justice Alito's opinion for the majority was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas; Justice Breyer's dissent was joined by Justices Stevens, Souter, and Ginsburg.²⁵⁵ The majority held for the petitioners, reversing the lower courts' decisions and requiring them to revisit their "misunderst[anding about] the obligation that the EEOA imposes on states."²⁵⁶ The majority also determined that the lower courts erred in determining "the nature of the inquiry that is required when parties such as petitioners seek relief [from a remedial injunction] under [Federal] Rule [of Civil Procedure] 60(b)(5) on the ground that enforcement of a judgment is 'no longer equitable.'"²⁵⁷ Accordingly, the Court held that the lower courts read the EEOA too narrowly and analyzed defendants' requests under Rule 60(b)(5) too rigidly.²⁵⁸ It also implied but did not explicitly state that the lower courts had reached the wrong conclusion about whether Nogales's ELL students continued to suffer harm sufficient to justify the injunctive relief.²⁵⁹ The majority's focus

251. See Brief for Respondents State of Arizona & Arizona State Board of Education at App. 1–4, *Horne v. Flores*, 129 S. Ct. 2579 (2009) (Nos. 08-289 & 08-294). The letter was dated June 6, 2008. *Id.*

252. Erik W. Robelen, *40 Years After ESEA, Federal Role in Schools is Broader than Ever*, EDUC. WK., Apr. 13, 2005, at 1, 42.

253. *Flores*, 516 F.3d at 1180.

254. *Horne*, 129 S. Ct. at 2588.

255. *Id.* at 2580.

256. *Id.* at 2588.

257. *Id.*

258. *Id.* at 2595–96.

259. *Id.*

on the situation in Nogales also underscored its very last section of the opinion, which questioned the district court's ability to impose an injunction applicable statewide.²⁶⁰

The dissent criticized the majority's Rule 60(b)(5) legal standard as inaccurate and precedentially problematic in a variety of ways.²⁶¹ It contended that the district court's Rule 60(b)(5) analysis properly focused on whether ELL instruction was supported by sufficient finances because that was the crux of plaintiffs' claims—and yet the district court also considered other changes (curricular, administrative, etc.) to the extent the parties raised them.²⁶² Regarding the statewide scope of the order, the dissent argued that this issue was not appropriately before the Court because it was not raised below, and further, the State-defendant itself had asked for the statewide relief, not the plaintiffs.²⁶³

3. After *Horne*: Interpreting the EEOA and/or How Much (Do Judges Think) “Money Matters”?

One aspect of the *Horne* decision in particular seems likely to limit the remedies plaintiffs will be granted in future EEOA cases and potentially in school desegregation or school finance cases. Specifically, *Horne* weighs in on the age-old question about the extent to which “money matters.” This issue arose directly in the *Horne* litigation in 2006, when the district court considered the State's request that it be released from the 2000–01 order to perform a cost study about the expense of educating ELL students—a cost study which would give the State an empirical basis for funding ELL programs at a certain level. When reviewing the district court's denial of this request, the *Horne* majority focused in on “multiple” ways in which the EEOA “appropriate action” standard could be satisfied—and, curiously, discussed and emphasized the non-monetary means

260. *Id.* at 2606–07.

261. *Id.* at 2617–21 (Breyer, J., dissenting). The majority (1) expected the district court to analyze issues the parties did not raise (and failure to examine these issues was not plain error); (2) did not place the burden of proof squarely on the movants; (3) applied the standard for modifying a judgment rather than the more demanding standard for setting aside a judgment, which is (4) whether the “decree's basic objectives have been attained” and that the harm is unlikely to recur even in the absence of a decree; (5) conducted an analysis in a manner that essentially permitted a review of the 2000 judgment long after time to file an appeal had expired, and (6) did not review the district court's decision for abuse of discretion, but instead used a substantially less deferential analysis. *Id.* at 2613–20.

262. *See id.* at 2608–15.

263. *See id.* at 2629–30.

for such satisfaction. At one point, the majority stated directly that “[f]unding is merely one tool that may be employed to achieve the statutory objective” of taking “appropriate action to overcome language barriers.”²⁶⁴ Later, it chided the district court for failing to make findings of fact about the impact of teaching methods and administrative systems that the Nogales district had improved while the litigation was proceeding.²⁶⁵ The majority suggested that these changes also could have remedied the EEOA violation even without a substantial funding increase.²⁶⁶

On the whole, the majority opinion reads like a chapter in the storied dispute among judges, lawyers, scholars, and policymakers about the extent to which increased funding can improve education and the courts’ role in ordering these types of remedies.²⁶⁷ These

264. *Id.* at 2600 (plurality opinion).

265. According to the majority, these changes included: “reduced class sizes, significantly improved student/teacher ratios, improved teacher quality, . . . a uniform system of textbook and curriculum planning” and a “largely eliminated . . . severe shortage of instructional materials.” *Id.* at 2604.

266. *Id.* The dissent disputed the Court’s claim that the district court overlooked those issues, citing to the record to demonstrate that the district court heard testimony, received evidence, and made factual findings regarding nearly all the issues identified by the majority, and also that none of the parties ever raised the factual issue on which the majority focused. *Id.* at 2623, 2626 (Breyer, J., dissenting) (“Perhaps the majority does not mean to suggest that the lower courts failed properly to examine these changes in teaching methods. Perhaps it means to express its belief that the lower courts reached the wrong conclusion Once again the Court’s ‘factual-finding’ criticism seems, in context, to indicate its disagreement with the lower courts’ resolution of this argument.”).

267. On appeal to the Supreme Court, both petitioners presented *Horne* as a case in which overreaching federal courts were interfering with the state and local business of education by strictly “requiring earmarked funding” for ELLs even though the standard for dissolving an injunction had been satisfied in other ways. Brief for Petitioner Superintendent at 33, *Horne*, 129 U.S. 2579 (2009) (Nos. 08-289 & 08-294). The rhetoric of the State Superintendent’s Brief in particular seemed to cast *Horne* as the most recent in the line of school desegregation cases, although both Petitioners’ briefs referred repeatedly to numerous prior Supreme Court decisions, including: *Board of Education of Oklahoma City v. Dowell*, Brief for the Petitioner Superintendent, *supra*, at 33–37, 39–41, 48–49; Brief for the Petitioner Speaker of the House of Representatives at I, 34, 35, 38, 43, 50, 65, *Horne*, 129 U.S. 2579 (Nos. 08-289 & 08-294); Reply Brief for the Petitioner Superintendent at 7, *Horne*, 129 U.S. 2579 (Nos. 08-289 & 08-294); Reply Brief for the Petitioner Speaker of the Arizona House of Representatives at 11, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294); *Dayton v. Brinkman*, Brief for the Petitioner Speaker of the House of Representatives, *supra*, at 33, 65; *Milliken v. Bradley (Milliken I)*, Brief for the Petitioner Superintendent, *supra*, at 39; Brief for the Petitioner Speaker of the House of Representatives, *supra*, at 66, and *II*, Brief for the Petitioner Superintendent, *supra*, at 36; Reply Brief for the Petitioner Superintendent, *supra*, at 8; *Missouri v. Jenkins*, Brief for the Petitioner Superintendent, *supra*, at 35, 36, 37, 41, 49; Brief for the Petitioner Speaker of the House of Representatives, *supra*, at 10, 47, 62, 64, 65; Reply Brief for the Petitioner Superintendent, *supra* note 239, at 7, 8, 9; Reply Brief for the Petitioner Speaker of the Arizona House of Representatives, *supra*, at 11; *San Antonio v. Rodriguez*, Brief for the

arguments have raged for the half century since James Coleman's oft-cited and oft-criticized studies after *Brown* concluded that there was little connection between the level of school funding alone and students' achievement. Disagreement about the impact of funding changes has occurred most visibly in the context of school desegregation litigation, school finance litigation, and, as here, EEOA litigation. In *Horne*, the majority noted what it called a "growing consensus in education research that increased funding alone does not improve student achievement"²⁶⁸ and stated that "education literature overwhelmingly supports reliance on accountability-based reforms *as opposed to* pure increases in spending."²⁶⁹ Similarly, it stated that "[t]he weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities."²⁷⁰ The dissent criticized the majority for addressing the issue briefly and simplistically, and also for failing to address "the many studies that cast doubt upon the results of the studies it cites."²⁷¹ Neither of the social scientists' amicus briefs reject or emphasize the empirical significance of social science evidence in support of funding to the extent the majority and dissent suggest they do, however.²⁷²

Petitioner Superintendent, *supra*, at 40 and *Swann v. Board of Education, Id.* at 48-49. So did several amicus curiae briefs. See, e.g., Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner at 11-18, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294); Brief Amicus Curiae of Pacific Legal Foundation & Evergreen Freedom Foundation in Support of Petitioners at 10-13, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294).

The brief on behalf of Flores and the class of affected parents and students addressed the federalism argument head-on, focusing on the many ways in which the district court had refrained from ordering specific relief and at one point explicitly distinguishing the instant case from the much-maligned Kansas City desegregation remedy. See Brief for Respondents Miriam Flores and Rosa Rzeslawski at 23-29 & n.5, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294).

268. *Horne*, 129 S. Ct. at 2604.

269. *Id.* at 2603 n.18 (emphasis added).

270. *Id.* at 2604.

271. *Id.* at 2628 (Breyer, J., dissenting) ("[T]he relation of a funding plan to improved performance is not an issue for this Court to decide through footnote references to the writings of one side of a complex expert debate.").

272. Eric Hanushek, on whose work the majority primarily relies, testified recently in the long-running Kansas school finance case that "money spent wisely, logically, and with accountability would be very useful indeed Only a fool would say money doesn't matter." Brief for Educational Policy & Finance Scholars as Amici Curiae in Support of Respondents at 19, *Horne*, 129 S. Ct. 2579 (No. 08-294). Consistent with this testimony, Hanushek was a signatory to an amicus brief which stated: "[s]tudies have consistently found that *how* money is spent is much more important than *how much* money is spent." Brief of Education-Policy Scholars as Amici Curiae in Support of Petitioners at 6, 9, *Horne*, 129 S. Ct. 2579 (No. 08-294). Another group of social scientists filed an amicus brief questioning Hanushek's methodology and challenging the characterizations of the

This mischaracterization will become increasingly important as *Horne* plays out in the lower courts. SEI, the pedagogical choice of Arizona's voters, comes at a higher per-pupil cost than instruction of native English speakers in a standard classroom because a successful SEI program may include ongoing teacher training, smaller class sizes, ESL supplements, coaching/mentoring for teachers, before- and after-school tutoring, support and translation for parents, and meaningful student assessment.²⁷³ Given that teacher quality is especially important in the success of any English language instruction program, a poorer district like Nogales which cannot even pay standard instruction teachers at the market rate is at a substantial disadvantage when it must compete against wealthier districts for bilingual-proficient teachers who are certified to teach English.²⁷⁴ The National School Boards Association, Arizona School Boards Association, American Association of School Administrators, National Education Association, and Arizona Education Association (unlikely bedfellows) united to file an amicus brief emphasizing that under the EEOA, English language instruction programs must be funded at a "meaningful level"—yet according to Arizona's own experts, districts have at most half the funding which is required to reach this level.²⁷⁵ Somehow the majority in *Horne* did not seem to view this substantial funding shortfall as a determinative part of the lower courts' EEOA inquiry.

Horne affects school finance litigation even more directly, as well. Over the past decade, plaintiffs have continued to press forward with various legal bases for implicitly or explicitly race/ethnicity-

social science brief; in its words, "a significant and growing body of empirical research . . . recognizes that, although funding alone will not guarantee students' success, inadequate funding ensures their failure." Brief of Educational Policy & Finance Scholars as Amici Curiae in Support of Respondents, *supra*, at 5. In the words of another amicus brief, "[t]here is no question that *at some level*, resources do matter." Brief for the National School Boards Association, Arizona School Boards Association, American Association of School Administrators, National Education Association & Arizona Education Association Amici Curiae Supporting Respondents at 15, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294) [hereinafter National School Boards Brief] (emphasis added). Amici seem to agree that some minimal level of funding is necessary.

273. Bruce D. Baker, Preston Green & Paul Markham, Legal and Empirical Analysis of State Financing of Programs for Children with English Language Communication Barriers 32 (date unknown) (unpublished manuscript, on file with the North Carolina Law Review); Memorandum from John A. Stoller, Jr. Assoc. Superintendent for Accountability, Ariz. Dep't of Educ., to Superintendents and Program Adm'rs 1, App. at 3, 5, 7-8 (May 7, 2009) (on file with the North Carolina Law Review).

274. See Brief for Education Policy and Finance Scholars, *supra* note 272, at 8.

275. National School Boards Brief, *supra* note 272, at 11-12.

conscious school finance litigation.²⁷⁶ The EEOA, with its strong emphasis on adequate funding for English language instruction programs, was one of the ways in which plaintiffs could bring such a lawsuit, given that nearly all ELL students are racially/ethnically non-White. Furthermore, in part because such litigation often was based on cost studies, EEOA litigation was more likely to be successful than general race/ethnicity-conscious school finance litigation for which no cost studies exist.²⁷⁷ Yet, the *Horne* majority's emphasis on satisfying the EEOA through non-financial means, its disregard for the state's six year failure to conduct a cost study for the cost of educating ELL students (as ordered by the district court), and its refusal to consider the likelihood that the state's funding changes would not allow it to continue to receive federal funding under NCLB²⁷⁸ are not encouraging for those who hope for an EEOA-based remedy. Considering the "money matters" language from *Horne*, school finance plaintiffs in general may be right to think their chances for ultimate success are more limited.

4. Guideposts for Interpreting NCLB

Horne was the first Supreme Court decision to interpret NCLB in even a cursory manner. Accordingly, it is significant that the Court stated in a footnote that "NCLB does not provide a private right of action,"²⁷⁹ and that the dissent agreed with this statement via a passing comment.²⁸⁰ Of greater importance to Latinos/as specifically,

276. Bowman, *supra* note 197, at 58.

277. Green et al., *supra* note 234, at 50; *see supra* Part II.B.2.

278. Respondents, the State of Arizona and the Arizona State Board of Education, argued that the Arizona legislature's modified funding scheme violated federal funding guidelines, and thus, the courts below were right to not consider that funding as "changed circumstances" which could moot the earlier finding that an EEOA violation existed. Brief for Respondents States of Arizona & Arizona State Board of Education, *supra* note 251, at 24.

279. *Horne v. Flores*, 129 S. Ct. 2579, 2598 n.6 (2009).

280. *Id.* at 2623–24 (Breyer, J., dissenting) ("The Court concedes, however, that both courts [below] did address the only argument about th[e] 'enactment' [of NCLB] that the petitioners made, namely, that 'compliance' with that new law automatically constitutes compliance with [EEOA] subsection (f)'s 'appropriate action' requirement . . . And the Court today agrees (as do I) that the lower courts properly rejected that argument.") (internal citations omitted).

It is undisputed that NCLB fails to provide an express private right of action, but litigation in at least nine states has debated whether NCLB contains an implied private right of action similar to Title IX of the Education Amendments of 1972—and all courts to consider this claim have rejected it. The cases in which this issue has been decided are as follows: *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) (affirming the district court below); *Simmons v. Santa Cruz County Dep't of Educ.*, No. C07-04064,

though, the defendants advanced the argument during the later stages of the litigation that NCLB conflicted with—and thus, superseded—the EEOA. Therefore, they contended, a state’s compliance with the NCLB requirements related to ELLs was equivalent to compliance with EEOA.²⁸¹ In the Supreme Court, plaintiffs-respondents and numerous amici focused on refuting these claims about NCLB’s dominance, which, if accepted, would have rendered EEOA meaningless and left individual ELL students without a private right of action to dispute inequitable English language instruction programs.²⁸² Various civil rights organizations, the National School

2008 WL 1777384 (N.D. Cal. Apr. 18, 2008); *Catapult Learning, Inc. v. Bd. of Educ. of St. Louis*, No. 4:07CV935, 2007 WL 2736271 (E.D. Mo. Sept. 17, 2007); *Holder v. Gienapp*, No. 06-cv-221, 2007 WL 952039 (D.N.H. Mar. 28, 2007); *Alliance for Children, Inc. v. City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655 (E.D. Mich. 2007); *Blanchard ex rel. Blanchard v. Morton Sch. Dist.*, No. C06-5166, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006); *Stokes ex rel. K.F. v. U.S. Dept. of Educ.*, No. 05-11764, 2006 WL 1892242 (D. Mass. Jul. 10, 2006); *Coachella Valley Unified Sch. Dist. v. California*, No. C 05-02657, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005); *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *Ass’n of Cmty. Orgs. for Reform Now v. N.Y. City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003). Many scholars and law students, however, have argued to the contrary. *See, e.g.*, Susan P. Stewart, *Lex-Praxis of Education in Informational Privacy for Public School Children*, 84 NEB. L. REV. 1158, 1192 (2006); Sarah Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PENN. L. REV. 1011, 1014–15 (2005); Melanie Natasha Henry, Comment, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 1117, 1142–43 (2004); Mariana Kihuen, Comment, *Leaving No Child Behind: A Civil Right*, 17 AM. U. J. GENDER SOC. POL’Y & L. 113, 114 (2009).

Given that *Horne* contains the Supreme Court’s first engagement with NCLB, the Court’s definitive aside seems especially powerful. The Court could distinguish these statements in a future case on the basis that the question of an *implied* right of action was not squarely before the Court and not briefed. (This issue came up because plaintiffs argued that Arizona’s education finance scheme violated the federal “supplement, not supplant” provisions in NCLB, provisions which have been in place in all of NCLB’s predecessor acts, stretching back to the landmark 1965 Elementary and Secondary Education Act.) It also could distinguish its statements in *Horne* as applying to the undisputed absence of an *express* private right of action. But, neither of those options seem likely given the Court’s general trend in favor of restricting individual rights, especially those part of a civil rights regime.

281. Brief for Petitioner Speaker of the House of Representatives, *supra* note 267, at I, iii–iv, 33–67; Brief for Petitioner Superintendent, *supra* note 267, at I, 31–36.

282. Brief for Respondents States of Arizona & Arizona State Board of Education, *supra* note 251, at 22–29; Brief for Respondents Miriam Flores and Rosa Rzeslawski, *supra* note 267, at 23–29; Brief for Civil Rights Organizations as Amici Curiae in Support of the Respondents at 11–12, 13–21, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294); Brief for the United States as Amicus Curiae Supporting Respondents at 9–10, 18–24, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294); Brief for the Asian American Legal Defense & Education Fund et al. as Amicus Curiae Supporting Respondents at 4–5, 12–38, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294); Brief for Asian American Justice Center et al. as

Boards Association, the National Education Association, and the U.S. Solicitor General's office all argued that the EEOA and NCLB have different purposes (the former a civil rights statute, the latter based on educational accountability), different foci (individual rights as opposed to the monitoring of group outcomes), different ways of demonstrating compliance (inputs versus results), different applicability (mandatory versus theoretically optional), and different enforcement mechanisms (private right of action and state action versus withholding of funding by the Department of Education alone).²⁸³ Ultimately, the Court held that “[a]pproval of a NCLB plan does not entail substantive review of a State’s ELL programming or a determination that the programming results in equal educational opportunity for ELL students,” and also pointed to the NCLB Title III savings clause, which exempted civil rights statutes from being superseded by implication.²⁸⁴ This holding is critically important for ELL students: since its enactment, EEOA has been a central part of the legal framework protecting ELL students’ educational rights. Especially since NCLB repealed the Bilingual Education Act, this is even more the case.²⁸⁵ If the Court had held that NCLB superseded EEOA, it would have removed ELL students’ private right of action to challenge the sufficiency of English language instruction. The Court’s decision to reject the “superseding” argument is significant for Latinos/as for obvious reasons: at least one-third of Latino/a students are estimated to be ELL and roughly three-fourths of all ELL students are Latino/a.²⁸⁶

In sum, like language instruction debates more generally, in some ways *Horne* is about much more than the specific question at issue. The rhetoric of the parties’ briefs, amicus briefs, and opinions of the Court situates this case near two incredibly contested areas of law: school finance and school desegregation litigation. Considering that the ELL population is growing rapidly and consists

Amicus Curiae in Support of Respondents at 3–4, 20–26, *Horne*, 129 S. Ct. 2579 (Nos. 08-289 & 08-294); National School Boards Brief, *supra* note 272, at 7–8, 27–36.

283. *See supra* note 282.

284. *Horne*, 129 S. Ct. at 2602 (quoting 20 U.S.C. § 6847 (2006)) (“[N]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right.”). As the Court noted, its rejection of defendants’ arguments was similar to its rejection of arguments in *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009).

285. Brief for Respondents Miriam Flores & Rosa Rzeslawski, *supra* note 267, at 2–3.

286. *See supra* Part I.B.2.b.

overwhelmingly of native Spanish-speaking Latinos/as,²⁸⁷ Latino/a students will be affected by the direct outcome of *Horne* more than students of any other racial/ethnic group for decades to come.

D. Looking to the Future: Litigation Priorities

This Part has examined three major litigation initiatives which have been used to pursue educational opportunities for Latino/a students over the past several decades. The utility of all of the initiatives has become increasingly limited. However, each of these initiatives can still be used to benefit Latinos/as in the following ways: changing community demographics may create circumstances in which Latino/a students and their parents are more likely to prevail in school desegregation litigation; these same plaintiffs are more likely after *Parents Involved* to be part of a multiracial/ethnic desegregation remedy; school finance litigation continues and may be entering an era in which it is race/ethnicity-conscious; and EEOA remains standing, not superseded by NCLB. Accordingly, Latino/a advocates should continue to press forward with litigation where supported by the caselaw, seeking educational equity in a necessarily piecemeal manner. Additionally, as the next Part suggests, advocates should consider the degree to which policy initiatives can effectively supplement or supplant litigation initiatives.

III. EDUCATION POLICY INITIATIVES AND LATINO/A STUDENTS

This Part will analyze three discrete policy initiatives which have been and/or can be an important part of pursuing educational opportunities for Latinos/as. These initiatives—civil rights recordkeeping, English language instruction, and multifactor socioeconomic status integration—are voluntary measures the government may employ. Importantly, each measure is constitutionally permissible, but none are constitutionally required. This Article includes a discussion of each of these initiatives for various reasons. First, because being race/ethnicity-conscious requires the use of racial/ethnic categories, the categories themselves are important. Thus, the first section interrogates the tension between acknowledging the complex nature of racial/ethnic groups' experience and keeping meaningful civil rights records. Second and third,

287. See *supra* note 149 and accompanying text.

because English language instructional alternatives and voluntary, multifactor socioeconomic status integration may be viewed as gap-fillers for the harms left unaddressed by the litigation initiatives discussed earlier,²⁸⁸ the following two sections ask about the degree to which these reform initiatives do and can benefit Latinos/as in different types of communities.

A. *Civil Rights Education Statistics*

At first, it may not seem like civil rights recordkeeping fits with the rest of the initiatives discussed in this Article. After all, recordkeeping involves government agencies collecting data, not enforcing rights or implementing new programs. Yet, continuing to keep records about students' educational opportunities and doing so in a racially/ethnically-conscious way is incredibly important so that school districts, scholars, and advocates can monitor the waxing and waning levels of racial/ethnic integration, compare different groups' rates of achievement and the gaps between those groups, and scrutinize other crucial aspects of educational opportunity.²⁸⁹ Collecting this data is more complicated than it may at first seem. As this section will discuss, the federal government still has not settled on an adequate way to account for Latino/a students, especially those who are multiracial/ethnic.

1. Civil Rights Recordkeeping, Generally

Collecting data for the purposes of civil rights monitoring and enforcement is perhaps the most well-accepted form of color-consciousness; the federal government has collected extensive data about children's educational opportunities for nearly half of a century. In 1997, the Congressional Office of Management and Budget ("OMB") implemented a directive which would eventually affect this data collection, instructing all federal agencies to allow individuals to report membership in multiple races and requiring agencies to separate racial identity from Latino/a ethnicity.²⁹⁰ Although the Department of Education did not fully implement this

288. See *supra* Part II.

289. ORFIELD & LEE, *HISTORIC REVERSALS*, *supra* note 13, at 45–47; BHARBAVA ET AL., *supra* note 165, at 13.

290. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Dep't of Education, 72 Fed. Reg. 59,266, 59,274 (Oct. 19, 2007) [hereinafter Final Guidance].

directive for a decade, under NCLB states have reported student achievement data disaggregated by at least five racial/ethnic categories, including Latino/a, since 2002.²⁹¹

2. The 2007 Guidance

In 2007, the Department of Education enacted the Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education (“Guidance”), with implementation to be completed by 2010.²⁹² The 2007 Guidance requires schools to engage in a two-part analysis to determine a child’s racial/ethnic identity.²⁹³ The first question asks about a child’s Latino/a ethnicity, and the second question asks about his or her racial heritage.²⁹⁴ This two-part analysis is not unusual—in fact it reflects data collection practices the Census Bureau has employed to one degree or another since 1970.²⁹⁵ Under the Guidance, all students who are identified as ethnically Latino/a are reported by school districts as Latino/a regardless of their race(s).²⁹⁶ Students are classified as multiracial if they belong to “[t]wo or more races,” but according to the plain language of the Guidance, multiracial Latinos/as are reported only as Latino/a—not as multiracial.²⁹⁷ By contrast, multiracial non-Latinos/as are reported as multiracial. Prioritizing a child’s Latino/a identity over his or her multiracial heritage in this way situates the category “Latino/a” on par with traditional single-origin racial categories such as “White” or “African American.” For many Latinos/as, the elevation of their group identity to this level reflects their lived experience. Yet for others, this taxonomy is problematic.

291. *Id.*

292. *Id.* at 59,267.

293. *Id.* at 59,274.

294. *Id.*

295. Bowman, *supra* note 18, at 1765–66.

296. Final Guidance, *supra* note 290, at 59,274 (“Educational institutions and other recipients will be required to report aggregated racial and ethnic data in seven categories: (1) Hispanic/Latino of any race; and, for individuals who are non-Hispanic/Latino only . . . [five single-race categories follow in addition to] two or more races.”).

297. *Id.*

Since the 1980s, a number of groups have unofficially constituted the Multiracial Category Movement (“MCM”).²⁹⁸ Initially, the movement’s most vocal advocates were parents of biracial and multiracial schoolchildren who objected to schools’ requirements that they classify their children as members of a singular race, even though the child’s parents were of different races.²⁹⁹ With the enactment of the 2007 Guidance allowing children or their parents to identify children as belonging to more than one racial group, the MCM has achieved a significant victory even though its focus since the 1990s has been on changing the Census Bureau’s classification practices.³⁰⁰ Yet, the manner in which the MCM victory occurred in the context of educational civil rights recordkeeping is notable because it has addressed (and presumably allayed) some of MCM critics’ concerns. For example, rather than merely declaring oneself “multiracial” and thus distancing oneself from minority racial groups, under the Guidance, a multiracial individual still identifies his or her connection to multiple monoracial categories.³⁰¹ Even though a multiracial child will be reported to federal authorities as belonging to “[t]wo or more [unnamed] races,”³⁰² the school district will collect and retain detailed information about the multiracial child’s racial and ethnic background.³⁰³ This is a significant step forward in balancing the accuracy/identity concerns with the realities of civil rights recordkeeping and enforcement.

298. See, e.g., Angelique M. Davis, *Multiracialism and Reparations: The Intersection of the Multiracial Category and Reparations Movements*, 29 T. JEFFERSON L. REV. 161 *passim* (2007); Maurice R. Dyson, *Multiracial Identity, Monoracial Authenticity & Racial Privacy: Towards an Adequate Theory of Multiracial Resistance*, 9 MICH. J. RACE & L. 387, 399–401 (2004); Tanya Katerí Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 *passim* (1998); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1521–27 (2000); Bowman, *supra* note 18, at 1765 n.94; Shalini R. Deo, Comment, *Where Have All the Lovings Gone?: The Continuing Relevance of the Movement for a Multiracial Category and Racial Classification After Parents Involved in Community Schools v. Seattle School District No. 1*, 11 J. GENDER RACE & JUST. 409 *passim* (2008).

299. Schools enforced monoracial classification because the state and federal agencies to which they reported data would only accept monoracial classifications. Davis, *supra* note 298, at 165; Jones, *supra* note 298, at 1521–22.

300. Jones, *supra* note 298, at 1522.

301. Final Guidance, *supra* note 290, at 59,274.

302. *Id.* at 59,276.

303. That information will be available if needed by a civil rights monitoring or enforcement agency, or if needed during litigation. *Id.*

However, other concerns remain. For example, this classification mechanism perpetuates the idea of “Latino/a” as a cohesive group and coherent identity—a questionable proposition in itself,³⁰⁴ and one which seems almost certain to become increasingly problematic as Latinos/as become less racially/ethnically “pure” in the coming decades.³⁰⁵ Furthermore, the Guidance’s privileging of Latino/a ethnic status over racial status does not provide a meaningful classification option for the increasing number of children who are both Latino/a and African American, Latino/a and Asian American, Latino/a and multiracial—et cetera—instead classifying them as solely Latino/a without regard to their racial or multiracial affiliation(s). This classification is a vestige of the old monoracial/ethnic scheme from which the OMB finally started to move away in 1997. The Guidance acknowledges this, but contends that to classify otherwise would simply be too much of an administrative hassle and expense both for school districts and for the federal government.³⁰⁶ An intermediate step may be possible, though. For now, I suggest that individuals who classify themselves as Latino/a and as a member of a racial/ethnic minority group could be reported as being “multiracial” just as individuals are who identify themselves as members of two racial groups. Obviously this is not a perfect solution—individuals with one Latino/a parent and one White parent would be reported as Latino/a, the percentage of individuals reported as Latino/a would decrease, and the category “multiracial” certainly does not fully describe a multiracial/ethnic identity. But, given the historic default classification of Latinos/as as racially White,³⁰⁷ and the ways in which our society currently understands and employs racial and ethnic

304. See *supra* Introduction, Part I.B.2.e.

305. See *supra* notes 190–94 and accompanying text.

306. Final Guidance, *supra* note 290, at 52,976–77 (“The Department’s final guidance reflects its assessment that the inclusion of individuals who are Hispanic/Latino of any race in one category is appropriate in light of both the implementation burden and cost that these changes will place on educational institutions and other recipients and the Department’s need to adopt an approach that provides the Department sufficient information to fulfill its various functions. If the Department required the reporting of the same racial categories for individuals who are Hispanic/Latino as for individuals who are non-Hispanic/Latino, six additional aggregate categories would be reported to the Department. The cost and burden of these six additional categories would be substantial because each racial and ethnic category is often cross tabulated with other relevant information, such as the individual’s sex, disability category, or educational placement, thereby multiplying the number of categories in which information must be reported . . .”).

307. See *supra* notes 38–42 and accompanying text.

categories,³⁰⁸ for the time being, this may be the best available temporary approach—especially because school districts would continue to collect and maintain detailed information about students' racial identification and Latinos/as' specific ethnic affiliations. Accordingly, the additional data will be useful in the future when we understand and/or employ racial/ethnic classifications differently yet still desire to show trends in groups' educational opportunities and access over time.

The tension between collecting data which describes the population in the most accurate manner possible, and which also allows for meaningful civil rights recordkeeping and enforcement, is not new. These questions are difficult, and the Department of Education, civil rights advocates, and others continue to grapple with them. In fall 2009, the Department of Education issued a general call for comments about its Civil Rights Data Collection practices, arguably including the 2007 Guidance.³⁰⁹ As this Article was going to press, at least one civil rights advocacy organization had submitted comments calling for the Department of Education to rescind or modify the 2007 Guidance.³¹⁰ Because our understandings about race and ethnicity continue to evolve as our population continues to grow and change, it is inevitable that the 2007 Guidance will be modified eventually—whether the modification occurs sooner or later remains to be seen.

B. English Language Instruction

Latinos/as' struggle for educational opportunity is multifaceted. The piece of this struggle perhaps most obvious to many non-Latinos/as in the United States is English language instruction, and indeed it is a crucial part of any comprehensive discussion about Latino/a educational equity.³¹¹ As discussed earlier, since the

308. See *supra* Part I.B.2.e.

309. Notice of Proposed Information Collection Requests, 74 Fed. Reg. 46,750 (Sept. 11, 2009).

310. Letter from Gary Orfield, Co-Dir., The Civil Rights Project/*Proyecto Derechos Civiles* (UCLA), Patricia Gandara, Co-Dir., The Civil Rights Project/*Proyecto Derechos Civiles* (UCLA) & Daniel J. Losen, Senior Educ. Law & Policy Assoc., The Civil Rights Project/*Proyecto Derechos Civiles* (UCLA), to Angela Arrington, Dir., Info. Clearance Div., Office of Planning, Evaluation, Policy Dev., U.S. Dep't of Educ. (Nov. 10, 2009) (on file with the North Carolina Law Review).

311. The type and availability of English language instruction services often affects Latino/a communities: native Spanish speakers comprise the vast majority LEP students in U.S. public schools (roughly 75%), and a large percentage of Latino/a students are LEP (estimates range from 18% to 45%). See *supra* Part I.B.2.b.

enactment of the EEOA, EEOA-based litigation has been a cornerstone of ELL students' pursuit of meaningful English language instruction in public schools.³¹² However, many disputes about English language instruction are not litigated, and even when they are, plaintiffs' ability to receive relief under EEOA—like plaintiffs' ability to succeed in desegregation litigation³¹³—is waning.³¹⁴ Thus, local school districts' decisions about English language instruction pedagogy become even more important. Accordingly, this section argues for the de-politicization of English language instruction pedagogy debates and advances the pedagogy of dual language immersion.

1. The Underlying Arguments

Although ELL students' right to receive some type of English language instruction has been well-established for decades, federal statutes and cases defer to school districts about pedagogical methods. A substantial body of research regarding the efficacy of language instruction programs and desegregation efforts has emerged over the past several decades, but there is still not an uncontroverted consensus about the central goals of English language instruction or, accordingly, a preferred pedagogical method. In fact, despite great advances in empirical knowledge, the arguments about (1) whether English language instruction and desegregation are theoretically and practically compatible, and (2) which English language instruction method is preferable have remained largely unchanged over the course of decades. As opponents have talked past one another, they have become increasingly entrenched in their positions.

The desegregation and “bilingual” education compatibility debate—whether these initiatives can coexist and whether we must subjugate one to the other—has been largely about the validity of segregating students who need English language instruction, and accordingly in part about the short- and long-term goals of

312. See *supra* Part II.C.

313. See *supra* Part II.A.1.

314. See *supra* Part II.C.

assimilating Latinos/as.³¹⁵ The competing conceptions of nationhood, citizenship, community, and identity fueling these discussions are also present in debates about English language instruction pedagogy. These pedagogical debates are, interestingly, one of very few areas of current education policy in which the focus is not only on achievement and accountability, but also still on public schools' mission of creating citizens with a distinctly American identity.³¹⁶ As such, these discussions are a battle over the status of groups (particularly Latinos/as) who seek to maintain a language other than English, and thus often a symbolic referendum about maintenance of "culture, customs, and values."³¹⁷ To complicate matters further, over the past few decades, advocates for very different pedagogical approaches have both, at times, emphasized local control and federal protection of civil rights.³¹⁸ Not surprisingly, English language instruction policies and related laws and regulations remain incredibly controversial across the country.³¹⁹ However, although Arizona, California, and Massachusetts remain the only three states to require

315. Comment, *Bilingual Education and Desegregation*, 127 U. PA. L. REV. 1564, 1565–66 (1979). In 1979, an unsigned student comment in the University of Pennsylvania Law Review summarized desegregation "versus" bilingual education arguments as follows: the idea that the two practices are in conflict is driven by the desire to assimilate groups of "others" into "a distinctly 'American' culture"; to the extent native language instruction is required to facilitate more rapid English language learning, such instruction is a necessary evil. *Id.* at 1565–66. The idea that the two are compatible is possible in an integrated bilingual classroom, where the goal is not to assimilate the other, but to teach both the other and the Anglo in English and the other's language, and enable all individuals in the classroom to become bilingual and bicultural. *Id.* Thirty years later, this is known as dual language immersion. At the time of the publication of that comment, it appears that only one major published study even tangentially addressed whether English-speaking children learned equally well in monolingual English classrooms as in bilingual classrooms, and it was inconclusive. *Id.* at 1569–74.

316. Ryan, *supra* note 121, at 143.

317. Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 325 (1987); see also DONATO, *supra* note 27, at 107 (discussing the problems with shaping the campaign for bilingualism and biculturalism because it assumed the American people were ready for a fundamental cultural change when, in fact, "Americans were satisfied with their institutions"); J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1020–21 (1995) ("[I]solationist trends in language education will further balkanize linguistic groups and increase ethnic strife.").

318. STEVEN BENDER, GREASERS AND GRINGOS 152 (2003); Moran, *supra* note 78, at 1250, 1314.

319. See, e.g., Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1247 (2000) (noting historical controversy); Moran, *supra* note 48, at 169 (describing legislation in California in the 1980s and 1990s); Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 209–16 (2001).

SEI pedagogy,³²⁰ public schools outside of major urban areas often limit their services to a couple of years of bilingual and/or ESL instruction.³²¹ Yet, as the demographics of suburban and rural public schools continue to change rapidly and as the ELL populations in those schools grow, districts have the opportunity to implement new programs in order to serve students' changing needs.

2. The Pedagogical Options

For at least thirty years, educators have viewed English language instruction as including a continuum of approaches, yet often policy and media reports discuss English language instruction as though long-term "bilingual" education and short-term "immersion" education are the only two models that schools use.³²² This inaccuracy has consequences. For example, research assessing the efficacy of various English language instruction programs is most accurate if it describes programs as they exist and if it does not attempt to fit program into the commonly understood shorthand of "bilingual" and "immersion." Yet, legislative, executive, and judicial decision makers can be wedded to these categories, and these individuals are particularly important because they often are researchers' target audience.³²³ Thus, to set the record straight, the continuum of language instruction pedagogies can be summarized as follows³²⁴:

320. Mary Carol Combs et al., *Bilingualism for the Children: Implementing a Dual-Language Program in an English-Only State*, EDUC. POL'Y, Nov. 2005, at 701, 702.

321. William N. Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of 'No Child Left Behind,'* 8 J. GENDER RACE & JUST. 393, 396, 418 (2004).

322. William P. Foster, *Bilingual Education: An Educational and Legal Survey*, 5 J.L. & EDUC. 149, 154-55 (1976).


323. Lisa B. Ross, *Learning the Language: An Examination of the Use of Voter Initiatives to Make Language Education Policy*, 82 N.Y.U. L. REV. 1510, 1535 (2007).

324. Michael D. Guerrero, *Research in Bilingual Education: Moving Beyond the Effectiveness Debate*, in CHICANO SCHOOL FAILURE AND SUCCESS, *supra* note 42, at 170, 175 (describing categories of language instruction utilized in one study assessing efficacy); Scott, *supra* note 8, at 140, 142.

Table 2. Continuum of Language Instruction Methods

More instruction in native language

Less instruction in native language



Late-exit Bilingual Education ³²⁵ + Content-based ESL ³²⁶	Transitional Bilingual Education ³²⁷ + Content-based or Traditional ESL ³²⁸	Content-based or Traditional ESL only	Structured English Immersion ³²⁹ + ESL-type Services ³³⁰	Submersion ³³¹
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(Dual language immersion programs do not fit easily on this continuum for two primary reasons. First, these programs vary substantially in terms of the English/other language split, and second, the goal of these programs is not to transition the ELL child out of

325. In “late-exit bilingual education,” students receive almost half (40%) of their educational instruction in every subject in their native language. Guerrero, *supra* note 324, at 171.

326. “Content-based ESL” is another term for “Structured English immersion.” *Id.* at 175.

327. In “transitional bilingual education,” students are taught to read in their native language and taught subject matter in English. *Id.* at 172. Students have thirty to sixty minutes a day of native language subject matter instruction until they are proficient in English, so they can then take regular English classes. Scott, *supra* note 8, at 140, 142. “These programs teach subject matter classes in an understandable language for the children so that they can progress in all subjects while learning English in a separate course.” *Id.* at 141.

328. “Traditional ESL instruction is centered on teaching the learner discrete aspects of the English language.” Guerrero, *supra* note 324, at 175.

329. In structured English immersion “specially trained teachers [deliver] all instruction in English, and English [is] taught simultaneously with academic content (e.g., mathematics; science). The students’ native language was used only to clarify instruction.” *Id.* at 170–71; Scott, *supra* note 8, at 140, 142. If the student enters in kindergarten, he/she is expected to be a part of the “mainstream classroom” in two to three years. Guerrero, *supra* note 324, at 170–71. “Structured immersion can have an integrating effect because native English speakers can be in the same classrooms as LEP students.” Scott, *supra* note 8, at 140, 142.

330. “ESL programs generally provided instruction aimed at developing the learner’s English language proficiency The native language of the student is generally not used during ESL instruction.” Guerrero, *supra* note 324, at 172.

331. “Submersion” is a “sink or swim” approach where “ELLs are simply placed in the mainstream English-speaking classroom.” *Id.*

the non-English language, but to develop his or her proficiency in both English and the other language.)³³²

Variation among pedagogical approaches is one factor which complicates the study of English language instruction efficacy. However, many other factors also are in play. Social science researchers have identified the following internal (within-student) variables as having the potential to substantially impact a student's English language acquisition: a student's personality traits (e.g., introverts and extroverts process information differently); learning style (visual, kinesthetic, etc.); state of being (e.g., anxiety level, motivation, attitude); quality of first language acquisition; and to a lesser extent, age.³³³ Researchers also have identified many major variables external to the student: hearing the second language and having it modeled in the home, school, and community;³³⁴ the school's leadership, climate, curriculum, and assessment methods;³³⁵ sufficient financial resources for schools and teachers (about twice that of educating an English-proficient child in a standard classroom);³³⁶ the wealth or poverty of the student's family;³³⁷ teacher quality;³³⁸ and parental involvement.³³⁹ A cutting-edge research question is the

332. DONNA CHRISTIAN ET AL., PROJECT 1.2 TWO-WAY IMMERSION FINAL PROGRESS REPORT 9 (2004), <http://www.cal.org/twi/pubs.html>; Bikle et al., *supra* note 50, at 590. For an up-to-date listing of all dual language programs in the United States, see Center for Applied Linguistics, Directory of Two-Way Bilingual Programs in the U.S., <http://www.cal.org/twi/directory/index.html> (last visited Feb. 2, 2010) [hereinafter Directory of Two-Way Bilingual Programs].

333. Myhill, *supra* note 321, at 396, 413–14.

334. *Id.*

335. Juan Perea et al., *Panel 1: Collective Latino and Latina Power—Myth or Reality?*, 7 HARV. LATINO L. REV. 75, 87 (2004) (Statement of Sandra Del Valle). According to a recent study:

Large urban school districts that are successful with English-language learners provide strong oversight from the central office for educating those students, ensure that general education teachers as well as specialists receive professional development on how to work with ELLs, and use student data in a meaningful way to improve instruction for that population.

Id. Mary Ann Zehr, *Study Cites Four Urban Districts for Successful Policies on ELLs*, EDUC. WK., Oct. 28, 2009, at 10, 10. Additionally, some highly successful charter schools use structured English immersion programs. Mary Ann Zehr, *Nurturing 'School Minds'*, EDUC. WK., Oct. 7, 2009, at 24, 24–27. In spite of these success stories, legislators debate whether charter schools serve ELLs better than traditional public schools. Mary Ann Zehr, *Evidence is Limited on Charters' Effect on ELL Achievement*, EDUC. WK., Sept. 16, 2009, at 8, 8.

336. Baker et al., *supra* note 273, at 22.

337. Bikle et al., *supra* note 50, at 590.

338. Perea et al., *supra* note 335, at 87; Ross, *supra* note 323, at 1534.

339. Ross, *supra* note 323, at 1534.

extent to which ELL students' practice in speaking English affects their English language acquisition.³⁴⁰ Considering all of these factors, it is incredibly difficult to isolate the effectiveness of one English language instruction model compared to another.³⁴¹ Still, although some researchers view the English language instruction research as generally inconclusive, many others summarize the research as favoring bilingual programs and other programs which use the student's first language.³⁴² But, much like attempting to measure the effects of school desegregation, many factors unrelated to an English language instruction policy influence its efficacy considerably. English language instruction pedagogy is important, but given its symbolic significance, perhaps it has become more of a battleground than it deserves to be.

3. Dual Language Immersion: Possible Common Ground

The vast majority of ELL students in the United States continue to be taught in structured immersion or bilingual-based programs.³⁴³

340. See Mary Ann Zehr, *Oral-Language Skills for English-Learners Focus of Researchers*, EDUC. WK., Oct. 21, 2009, at 8, 8.

341. Even if a researcher could control for all of these internal and external variables, such controls would yield valuable research results but would not lead to the same practical results when implemented in schools and classrooms where these variables—ways of quantifying students' lived experiences—do come into play and must be accounted for.

342. See, e.g., WAYNE P. THOMAS & VIRGINIA P. COLLIER, A NATIONAL STUDY OF EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS' LONG-TERM ACADEMIC ACHIEVEMENT 7 (2003), available at <http://www.usc.edu/dept/education/CMMR/CollierThomasComplete.pdf> (finding that bilingually schooled students outperformed comparably monolingually schooled students after four to seven years of dual language instruction); Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit "Appropriate Action" for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 384–85 (2005) (summarizing multiple studies and literature reviews); Stephen Krashen & Grace McField, *What Works? Reviewing the Latest Evidence on Bilingual Education*, LANGUAGE LEARNER, Nov.–Dec. 2005, at 7, 7–9 (discussing the significance of meta-analysis literature reviews controlling for variables in different studies reaching similar conclusions about the higher performance of students in bilingual programs); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 246–47 n.71 (2007) (citing H.D. ADAMSON, LANGUAGE MINORITY STUDENTS IN AMERICAN SCHOOLS 231–32 (2005) (citing research showing that well-run bilingual programs are effective, but that not all bilingual programs are well-run)); Ross, *supra* note 323, at 1533–34; Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 REV. EDUC. RES. 247, 273 (2005) (reviewing seventeen studies of various language programs, twelve of which found positive effects of bilingual education and none of which found results favoring English immersion).

343. See *supra* Part II.B.1–2.

Yet, one other type of program presents a unique opportunity to operate from a different paradigm and to advance the traditional goals of desegregation and bilingual education programs. Dual language programs, also known as two-way immersion, demonstrate a structure built on very different premises than the English language instruction programs with which the general public is most familiar. In dual language programs, native English speakers and non-native speakers are enrolled in the same classroom and taught in both English and the native language of the other group.³⁴⁴ The goal of these programs is to enroll students who are both native English speakers and non-native speakers and to educate all of the children to be bilingual and bicultural.³⁴⁵ Importantly, the goal is not limited to teaching English to the non-native speakers.

The first dual language program in the United States opened in 1963 in Dade County, Florida, at the request of the Cuban immigrant community.³⁴⁶ Still, by 1990, not even forty dual language programs existed, but in 2000, 253 had been established.³⁴⁷ In 2000, President Clinton's Secretary of Education, Richard Riley, called for one thousand new dual language programs and spoke of the benefits of multilingualism,³⁴⁸ but four years and one presidential election later, still only 304 dual language immersion programs were available in a total of twenty-six states and the District of Columbia.³⁴⁹ Nearly 28% of these programs were in New York City.³⁵⁰ By July 2009, the number had grown to 346 programs in twenty-seven states.³⁵¹ Most of these programs exist at the elementary school level.³⁵²

Many researchers consider dual language programs to have "great potential" to enhance students' educational opportunities.³⁵³

344. See Patricia Gandara, *Latinos, Language, and Segregation: Options for a More Integrated Future*, in LOOKING TO THE FUTURE: LEGAL AND POLICY OPTIONS FOR RACIALLY-INTEGRATED EDUCATION IN THE SOUTH AND THE NATION (forthcoming 2011) (manuscript at 9, on file with the North Carolina Law Review).

345. *Id.* (manuscript at 9).

346. See Bikle et al., *supra* note 50, at 590.

347. *Id.*

348. See Laura M. Padilla, "But You're Not a Dirty Mexican": Internalized Oppression, Latinos, and Law, 7 TEX. HISP. J.L. & POL'Y 59, 109-10 (2001) (citing Anjetta McQueen, *Latino Students More Likely to Drop Out, Study Says; Education Secretary Calls for Dual-Language Schools*, SAN DIEGO UNION-TRIB., Mar. 16, 2000, at A8).

349. Perea et al., *supra* note 335, at 87-88.

350. *Id.*

351. CHRISTIAN ET AL., *supra* note 332 (citing Directory of Two-Way Bilingual Programs, *supra* note 332).

352. Bikle et al., *supra* note 50, at 590.

353. *Id.*; see Gandara, *supra* note 344 (manuscript at 9, 13).

Such programs seem to promote rapid language acquisition, result in academic success, create various rates of collateral racial/ethnic integration and interaction,³⁵⁴ counteract some White flight, deter drop-out rates among Latinos/as, and encourage interest in college among Latinos/as.³⁵⁵ Furthermore, dual language programs have the symbolic effect of supporting bilingualism and multilingualism,³⁵⁶ thus potentially creating a higher level of trust and connection between the Latino/a community (especially undocumented Latinos/as) and the school system.³⁵⁷ Yet, the challenges to creating and maintaining widespread dual language programs are not inconsequential, and include finding enough teachers who are not only bilingual but are also trained to teach in both languages; generating sufficient community support for these programs; having a non-native English-speaking population large enough to justify a program; and since 2002, also being able to satisfy the rapid English acquisition expected by NCLB.³⁵⁸

These challenges are substantial, and some can be addressed more easily than others. For example, the federal government can encourage dual language programs in several ways. First, it can incentivize the creation of dual language programs and remove

354. See Gandara, *supra* note 344, *passim*. Seattle's dual language program pre-*Parents Involved* was sited specifically to encourage racial/ethnic integration. Sanjay Bhatt, *Dual-language School Lauded as National Model*, SEATTLE TIMES, Nov. 17, 2004, at B1, available at http://seattletimes.nwsources.com/html/localnews/2002091980_stanford16m.html.

355. See Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 14 (2007) (discussing a dual language immersion program in operation in Illinois School District 112 since 1996 which enrolls nearly 600 students annually; classrooms are divided equally between English-dominant and Spanish-dominant students); Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 736 (2007) [hereinafter Kaufman, *Reading, Writing, and Race*]; *id.* at 15 ("[I]n Kindergarten through eighth grade [students in dual language programs] acquire English language skills at a more rapid rate than their Spanish-dominant peers in traditional bilingual programs"). Also in Illinois School District 112, English-dominant students demonstrate academic success equal to or surpassing their peers in monolingual classrooms. CHRISTIAN ET AL., *supra* note 332, at 8; Bikle et al., *supra* note 50, at 595 (discussing research regarding academic achievement, language acquisition, and cross-cultural understanding); Kaufman, *Reading, Writing, and Race*, *supra*, at 15; Ross, *supra* note 323, at 1535-36 (discussing the academic success and popularity of dual language immersion programs in Massachusetts).

356. See Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 765 (2006).

357. Rabin et al., *supra* note 110, at 46.

358. Bikle et al., *supra* note 50, at 602.

roadblocks to such programs' existence³⁵⁹ in traditional public schools by providing grant funds to local school districts, states, and universities for researching, developing, and implementing dual language programs, and also by providing continuing education for faculty and staff. Such grant funds would be likely to benefit major urban centers *and* diverse suburbs where the student demographics make these programs more feasible. Furthermore, if NCLB requirements deter dual language programs, the U.S. Department of Education could create an exception for dual language programs and permit modified student assessment, as it has done repeatedly for students with disabilities.³⁶⁰ Third, Rachel Moran has suggested that charter schools can be transnational in focus and consider connections among people across national boundaries.³⁶¹ I further suggest that the Obama administration's recent emphasis on charter schools³⁶² could specifically encourage that approach, which would dovetail with dual language programs' goals of educating students to be bilingual and bicultural.

In sum, the debates about English language instruction continue, and in many ways they are the same debates proponents and opponents of various approaches have been engaged in for decades. Yet, the discussion may become more productive if parties recognize the arguments undergirding these disputes, discuss programs with more specificity and accuracy, and acknowledge the multitude of other factors which significantly affect English language acquisition. Furthermore, creating widespread dual language immersion programs should be a long-term goal for local school districts, states, and the federal government. And, districts implementing these programs should monitor the racial/ethnic composition of students participating in these programs so that the degree to which the programs facilitate ancillary racial/ethnic integration is known.

359. See generally Moran, *supra* note 78, *passim* (discussing the federal government's influence on local education policy through creating incentives, issuing guidances or guidelines, and adopting different legislative schemes).

360. Michelle Croft, Note, *Modified Assessments and No Child Left Behind: Beneficial to Students with Disabilities but Potential Problems in Implementation*, 11 J. GENDER RACE & JUST. 513, 513-14 (2008).

361. Rachel F. Moran, *The Transnational School*, 9 U.C. DAVIS J. INT'L L. & POL'Y 63, 96-102 (2003).

362. Sam Dillon, *After Criticism, the Administration Is Praised for Final Rules on Education Grants*, N.Y. TIMES, Nov. 12, 2009, at A20; *Obama's Charter Stimulus*, WALL ST. J., June 12, 2009, at A14; WhiteHouse.gov, Education, <http://www.whitehouse.gov/issues/education> (last visited Jan. 22, 2010).

C. Multifactor Socioeconomic Status Integration

In addition to being concentrated in racially/ethnically isolated schools with high proportions of other Latinos/as, Latino/a students often are concentrated in schools with many students in poverty. Decades of school desegregation and school finance litigation have been unable to change this experience—often of concentrated disadvantages—for millions of African American and Latino/a students across the country.³⁶³ Thus, this section considers a voluntary policy that more and more school districts are enacting: multifactor socioeconomic status (“SES”) integration. The idea of integrating students based not on their race/ethnicity, but rather based on their socioeconomic status, is increasingly popular—perhaps especially because many Whites remain resistant to race/ethnicity-conscious equity measures.³⁶⁴ Further, because wealth-based classifications are not subject to strict scrutiny, SES integration policies are less vulnerable to legal challenge than integration policies which consider race/ethnicity and are subject to strict scrutiny.³⁶⁵ This section examines how SES integration policies work, considers their increasing popularity, and speculates about their likely-limited ability to benefit Latino/a students—an ability that appears greater in suburban settings than in major urban districts, where a majority of Latino/a students still attend school.

1. Defining the Policy

SES integration is a current darling among education policy reform proposals, even garnering the support of the Bush administration as recently as 2008.³⁶⁶ The idea that enhancing poor

363. See *supra* Part II.B.2.c–d.

364. Whites generally contend that racial discrimination is more rare than non-Whites report. See, e.g., Hutchinson, *supra* note 202, at 919.

365. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973).

366. Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL’Y ANALYSIS 49, 53 (2006). OCR’s open letter read:

The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools. Unlike the assignment plans in *Parents Involved*, genuinely race-neutral measures—for instance, those truly based on socio-economic status—do not trigger strict scrutiny and are instead subject to the rational-basis standard applicable to general social and economic legislation.

Letter from Stephanie J. Monroe, Assistant Secretary for Civil Rights, U.S. Department of Education, to Colleagues (Aug. 28, 2008), <http://www.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html> [hereinafter Letter to Colleagues].

students' educational resources can increase their educational achievement is not new³⁶⁷: in fact, Title I has sought to provide additional resources targeted to students in poverty since 1965.³⁶⁸ Yet, SES integration differs from Title I funding in that SES integration focuses on creating schools in which poor and non-poor students are integrated with one another, rather than providing additional funding to schools with many students in poverty.³⁶⁹ Data generally suggest that SES integration is beneficial for poor students—in general, their achievement increases when their classmates are more economically diverse—and it does not harm non-poor students' achievement.³⁷⁰

SES integration policies are in place in at least sixty districts throughout the country and can take many forms.³⁷¹ The most bare-bones policies use only one factor to divide students into two groups: whether an individual student is enrolled in federally funded free and reduced lunch or meals programs.³⁷² It is easy for a school district to use this criterion because the district maintains its own records of which students have signed up for free and reduced lunch or meal

367. Reardon et al., *supra* note 366, at 50–51 (“[I]n addition to individual family background, a school’s socioeconomic context is strongly related to students’ educational outcomes.”). In Neil Kraus’s words:

[S]tudents in low-income areas suffer from lower levels of resources and investments at both the family and school levels, which substantially affect educational outcomes. This research shows that a family’s economic well-being can shape a child’s cognitive development in the early years, and economically better-off families are more likely to hire tutors, meet with teachers, use “proper” English in the household, and create educationally meaningful leisure time for their children. Further, lower-income students suffer from a wide range of health-related problems when compared to economically better-off students, including poorer vision and oral hygiene, more asthma and lead poisoning, poorer nutrition, less adequate pediatric care, and more exposure to smoke. The combined influence of all these obstacles faced by students in poverty is “probably huge.”

Neil Kraus, *Concentrated Poverty and Urban School Reform: “The Choice is Yours” in Minneapolis*, 41 EQUITY & EXCELLENCE EDUC. 262, 262–63 (2008).

368. See Elementary and Secondary Education Act of 1965, Pub. L. 89-10, §§ 201–212, 79 Stat. 27, 27–36 (codified as amended at 20 U.S.C. §§ 6301–6578).

369. Reardon et al., *supra* note 366, at 50.

370. RICHARD KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 23–76 (2001) (surveying the literature and making the case for socioeconomic status (“SES”) integration); Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1432 (2007); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2103–08 (2002).

371. Richard Kahlenberg, *Socioeconomic School Integration: Preliminary Lessons from –More than 60 Districts* (forthcoming 2011) (manuscript at 12–13, on file with the North Carolina Law Review).

372. Reardon et al., *supra* note 366, at 50.

programs.³⁷³ (To be clear, though, using only that one factor and calling it SES integration is a bit of a misnomer; that is at best mere income integration, not *socioeconomic* integration, which considers issues of class and status as well as poverty.) Specifically with regard to Latinos/as, a single-factor income integration policy based on participation in federal free and reduced lunch or meal programs can be problematic because it will under-identify Latinos/as in poverty. Not all students who are eligible for program participation actually apply; scholars suspect this occurs with disproportionate frequency in the Latino/a community where some of the poor are also undocumented and thus particularly likely to avoid drawing attention to themselves by applying for government benefits.³⁷⁴

Not all socioeconomic integration policies are single-factor, however. Many approaches account for multiple factors to better divide students into “more advantaged” and “less advantaged” groups, and thus better account for socioeconomic status. Some of these factors operate at the individual level, for example whether a student is an ELL or lives in low-income housing.³⁷⁵ Other factors operate at the community level and are based on information gleaned from census tracts, including neighborhoods’ minority racial/ethnic isolation, educational achievement of adults in the neighborhood, and the prevalence of low-income housing in the area.³⁷⁶ However, school districts often lack the resources to develop multifactor definitions and databases of more advantaged and less advantaged groups of students. Fortunately, at least one private sector company is filling this gap. In the past few years, the College Board, which is perhaps best known for administering the SAT and PSAT exams, has created databases which classify over 180,000 neighborhoods and more than 27,000 high schools across the country into one of thirty different “geodemographic” profiles.³⁷⁷ The neighborhoods are defined at the level of nine-digit zip code and consider thirty-six factors which describe the neighborhood population in a manner that quantifies socioeconomic advantage and disadvantage concretely, and is probably more specific than any elementary and secondary school

373. *Id.*

374. BHARBAVA ET AL., *supra* note 165, at 14; ORFIELD & LEE, HISTORIC REVERSALS, *supra* note 13, at 22.

375. Bowman, *supra* note 197, at 68.

376. *Id.*

377. COLLEGE BOARD, DESCRIPTOR PLUS: EDUCATIONALLY RELEVANT GEODEMOGRAPHIC TAGGING 2 (2007), available at <http://professionals.collegeboard.com/profdownload/descriptor-plus-geodemography-description.pdf>.

SES integration program in existence.³⁷⁸ Although the College Board has created these datasets for purchase and use by college and university admissions offices,³⁷⁹ this is exactly the sort of information which would be most helpful in creating multifactor SES integration programs which meaningfully integrate more and less advantaged students in elementary schools. School districts now need the financial ability to access this information and may be able to look to federal or state grants to support the acquisition and use of this data.

2. Projected Impact on Latinos/as

Without running data-based simulations, it is difficult to estimate the impact that multifactor SES integration could have on Latinos/as either as a group or when Latinos/as are divided into specific national origin groups such as Mexican Americans or Cuban Americans. In part, this is because the contours of each SES integration plan significantly affect its ability to create ancillary racial/ethnic integration.³⁸⁰ Additionally, although it may be tempting to assume that single or multifactor SES integration is a colorblind mechanism which leads to racially integrated schools—indeed, a summer 2008 letter from the Bush administration’s Department of Education suggested just this³⁸¹—this is not necessarily the case.³⁸² Sean Reardon has modeled the likely racial effects of single factor SES integration (income integration) extensively.³⁸³ Although Reardon’s simulations focus only on African American and White students, his findings may also be applicable to Latinos/as at a general level. In 2006, Reardon and his co-authors determined that “in general, income integration is no guarantee of even modest racial desegregation” because “the extent of ancillary racial integration produced by an income-integration policy will depend on the size of racial income disparities within a given district, the specifics of an income-integration policy, and the patterns of racial and socioeconomic segregation in a school

378. *Id.*

379. Peter Schmidt, *U. of Michigan Says It Has Avoided a Big Drop in Diversity from Proposal 2*, CHRON. HIGHER EDUC., June 17, 2008, <http://chronicle.com/article/U-of-Michigan-Says-It-Has-/41171>.

380. Reardon et al., *supra* note 366, at 67.

381. Letter to Colleagues, *supra* note 366.

382. Reardon et al., *supra* note 366, at 49; Richard D. Kahlenberg, *The New Look of School Integration*, AM. PROSPECT, June 2, 2008, http://www.prospect.org/cs/articles?article=the_new_look_of_school_integration.

383. Understandably, because multifactor SES integration plans can vary so much from one to another and because the sort of additional information those plans would consider is so difficult to access, the existing modeling focuses on income integration alone.

district.”³⁸⁴ Given that, in the words of the NAACP, race/ethnicity and poverty are “certainly connected [but] not perfectly correlated,”³⁸⁵ an income integration policy is likely to produce substantial racial/ethnic integration only in the rare areas demographically similar to the Wake County public schools in North Carolina, where nearly all the poor children are African American and almost all of the non-poor children are White.³⁸⁶ Considering the income diversity within the Latino/a population (only 21% of the Latino/a population is in poverty), there is no obvious reason to assume without knowing more about an individual district that an income-based integration policy would cause Latinos/as to become more integrated with non-Latinos/as.

384. Reardon et al., *supra* note 366, at 49.

385. BHARBAVA ET AL., *supra* note 165, at 15. The U.S. Census Bureau reports that, nationally, 21% of the Latino/a population is in poverty, which is lower than the poverty rate for African Americans (25%), but higher than the poverty rate for Whites (10%). U.S. Census Bureau, American Community Survey, S1701: Poverty Status in the Past 12 Months (2007), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “S1701”). When Latinos/as are disaggregated into foreign-born and native-born, the poverty rate is estimated to be about 8% higher among the foreign-born. FRY & GONZALES, *supra* note 7, at iv. Among the foreign-born, Puerto Ricans’ low levels of family income are distinct, which may be attributable to the comparative ease with which they settle in the continental United States, given that they are already U.S. citizens. Massey, *supra* note 15, at 460–61; South et al., *supra* note 171, at 508. To the contrary, Cuban and Nicaraguan immigrants are more often high-status individuals with higher education levels. Massey, *supra* note 15, at 460; South et al., *supra* note 171, at 508. However, of all poor Latinos/as, 45% are children. U.S. Census Bureau, C17020I: Poverty Status in the Past 12 Months by Age (Hispanic or Latino) (2007), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C17020I”). This is slightly higher than the rate for African Americans (42% of the poor are children), and much higher than the rate for Asian Americans (25% of the poor are children) and Whites (29% of the poor are children). U.S. Census Bureau, C17020B: Poverty Status in the Past 12 Months by Age (Black or African American Alone) (2007), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C017020B”); U.S. Census Bureau, C17020D: Poverty Status in the Past 12 Months by Age (Asian Alone) (2007), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C17020D”); U.S. Census Bureau, C17020A: Poverty Status in the Past 12 Months by Age (White Alone) (2007), <http://factfinder.census.gov> (find “American Community Survey”; select “get data”; choose “enter a table number”; enter number “C17020A”).

386. BHARBAVA ET AL., *supra* note 165, at 49 (“African American students are about ten times as likely to be as poor as white students. . . . Wake County has relatively few white students who come from low-income families and relatively few African American and Latino and Latina students who come from more affluent families.”); Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of the Supreme Court’s Integration Decision*, EDUC. DIG., April 2008, at 4, 12 (“[R]esegregation occurred in two of the [five] districts and racial isolation increased in the other three.”).

The ability of Latino/a students to benefit from SES integration also can be measured by the reduction of Latino/a students in high-poverty schools. However, the ability to produce schools in which students in poverty are less concentrated is likely to vary substantially by geographic area. Nationwide, urban/city school districts educate 31% of all public school students; suburban school districts, 38%; and rural/town school districts, 31%.³⁸⁷ Of all Latino/a public school students, 47% are enrolled in urban/city districts; 36% in suburban districts; and 17% in rural/town districts.³⁸⁸ As a group, Latinos/as are slightly more concentrated in high-poverty city and suburban schools than are African Americans: 46% of Latinos/as in city schools attend high poverty schools as do 25% of Latinos/as in suburban schools, compared to 44% and 19% of African Americans, respectively.³⁸⁹ Thus, at a very general level, it appears that Latino/a students are likely to have some increased opportunities to attend lower poverty schools in districts which employ income integration plans simply because many Latinos/as currently attend high-poverty schools. However, because the rate of student poverty often is incredibly high in urban/city districts³⁹⁰—especially in major urban districts, which educate millions of students, primarily African Americans and Latino/as—integration based on income alone is not likely to change enrollment patterns in major urban districts significantly, whether by creating ancillary racial/ethnic integration or by creating substantial poor and non-poor integration.

In contrast, suburban districts, which enroll more than one-third of all Latino/a public school students, may present unique opportunities for multifactor SES integration to achieve success on both of these measures.³⁹¹ A new study by the Pew Hispanic Center shows, first, that the number and percentage of Latino/a students in suburban school districts has grown rapidly over the past decade.³⁹² Second, the national average racial/ethnic profile of suburban school

387. RICHARD FRY, PEW HISPANIC CTR., *THE RAPID GROWTH AND CHANGING COMPLEXION OF SUBURBAN PUBLIC SCHOOLS* 1 (2009), *available at* <http://pewhispanic.org/files/reports/105/pdf>.

388. *Id.* at 4.

389. *THE CONDITION OF EDUCATION* 2008, *supra* note 127, at 152.

390. According to John Witte, a political science professor at the University of Wisconsin-Madison, 70% of Milwaukee public school students are poor, as are 85% of students in the Detroit public schools. Lawrence Hardy, *Separate Our Students by Race and Income to Meet NCLB?*, EDUC. DIG., Sept. 2006, at 12, 18.

391. FRY, *supra* note 387, at 4.

392. *Id.*

districts mirrors the composite national public school population.³⁹³ Third, individual suburban districts often have racial/ethnic demographic profiles that are also close to the average nationwide student population.³⁹⁴ Yet, individual schools within racially/ethnically diverse suburban districts often remain racially/ethnically isolated.³⁹⁵ The Pew Hispanic Center reports that “[i]n 2006–07, the typical suburban Hispanic student attended a school that was 49% Latino.”³⁹⁶ Thus, it appears that although Latinos/as are moving increasingly to suburban neighborhoods,³⁹⁷ that demographic change sometimes leads to less racially/ethnically isolated suburban districts, even though it leads to more racially/ethnically isolated individual schools. Also considering the greater economic diversity of suburban communities, suburban school districts appear to present an incredible opportunity for multifactor SES integration to create schools that are diverse in myriad ways. Finally, this opportunity may be better in some regions of the country than in others: Northern districts often are smaller and more racially/ethnically homogenous than Southern districts, which often are county-wide.³⁹⁸ Especially because of the popularity of this policy initiative, future research in this area is desperately needed—and must consider the impact of these policies on Latino/a students.

D. *Looking to the Future: Policy Priorities*

This Part has focused on three discrete policy initiatives: civil rights recordkeeping, English language instructional methods (especially dual language programs), and multifactor SES integration programs. Latino/a students, their parents, and advocates can influence the existence of these policies through lobbying efforts, but ultimately the existence of these policies is up to the federal government through recordkeeping and to local school districts through language programs and multifactor SES integration. These policies can benefit Latino/a students in varying ways: race/ethnicity-conscious recordkeeping makes Latinos/as’ experiences visible; English language instruction programs ideally assist Latino/a ELL

393. *Id.*

394. *Id.* at i.

395. *Id.*

396. *Id.* at ii.

397. See *supra* notes 174–80 and accompanying text.

398. Erin Nave, Note, *Getting to the Roots of School Segregation: The Challenges of Housing Remedies in Northern School Desegregation*, 21 NAT’L BLACK L.J. 173, 174, 176 (2009).

students in developing English fluency; dual language instruction programs value bilingualism and can potentially pursue both the goals of racial/ethnic integration and English language instruction; and multifactor SES programs have the potential to situate Latinos/as in more racially/ethnically and socioeconomically diverse schools. But, at the present time, none of these policies sufficiently fills the major gaps created by the ever-more constrained reach of school desegregation litigation, school finance litigation, and EEOA litigation. Civil rights recordkeeping is necessary to a continued race/ethnicity-conscious approach, but school districts' use of students' individual demographic data is incredibly limited. Prioritizing the widespread dual language immersion programs could have significant positive results, but because of numerous practical constraints including, but not limited to, the availability of qualified teachers, this must be a long-term, rather than a short-term goal, even though it has the potential to benefit Latinos/as and other students in a variety of urban and suburban areas. And finally, multifactor SES integration is likely to have little impact on many major urban areas, although it has the potential to benefit a substantial number of the roughly one-third of Latino/a students who are enrolled in suburban schools.

CONCLUSION

The Supreme Court's 2007 holding in *Parents Involved* was a blow to civil rights advocates. Prohibiting schools from considering individual students' race/ethnicity in voluntary student assignment plans substantially limits districts' ability to create racially/ethnically diverse learning environments. Yet, taken together, the legal and policy initiatives discussed in this Article reveal that race/ethnicity consciousness in education law and policy continues to be possible in many contexts. First, *Parents Involved* can be read as encouraging multigroup remedies in successful desegregation cases. Second, race/ethnicity-conscious school finance litigation remains a possibility. Third, the federal government is not backing away from race/ethnicity-conscious civil rights recordkeeping. Fourth, voluntary, multifactor SES integration is increasingly focusing on identifying children with both fewer and greater educational advantages, including by considering community-level racial/ethnic demographics, among other factors.

The central benefit of such these race/ethnicity-conscious approaches is that they help illuminate persistent inequalities and ensure that equitable educational opportunities for Latinos/as and

others are not merely an ancillary effect of otherwise valuable policies. Accordingly, this Article has employed a race/ethnicity-conscious approach, and the analysis has demonstrated that each of the litigation and policy strategies analyzed earlier have the potential to continue to benefit Latino/a students—but only to a limited degree. Since the 1970s, the legal protections of school desegregation litigation, school finance litigation, and federal English language instruction statutes have all become more limited in their use to plaintiffs. Even currently popular policies, such as dual language immersion instruction and multifactor SES integration, are not able to fully fill the gaps created by the current legal regime. When consolidating the benefits of all of these strategies, it becomes clear that much of the pursuit of equitable educational opportunities for Latinos/as is ahead of us, and we do not yet have the litigation and policy tools to reach the goal. This is especially apparent when considering Latino/a students who are concentrated in racially-identifiable, high-poverty urban schools.

Today, Latinos/as constitute the largest group of non-White public school students in the United States. We cannot ignore the substantial educational challenges and substandard educational experiences which continue to plague so many of these students. We also cannot abandon the pursuit of equitable educational opportunities for all students—however piecemeal that must be.

